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COMMAND CRIMINAL RESPONSIBILITY: A PLEA FOR A WORKABLE STANDARD*

by Colonel William G. Eckhardt**

PREFACE

A major revision of the law of war is in process. The unusual timing of historical and political events requires Americans to seek a practical articulation of the standard of behavior expected of their combat commanders. The purpose of this article is to constructively participate in that search.

The cornerstone of military professionalism is professional conduct on the battlefield. The articulation of that professional conduct, in addition to underscoring the legitimacy of the honorable profession of arms, would shield commanders from untutored, politically motivated allegations of war crimes and, more importantly, would allow the teaching of expected conduct and thus prevent institution-staining misconduct. An examination of the current and the proposed new standards reveal an alarmingly unsettled and dangerously inarticulated expression of the most basic social contract between a soldier and the citizenry he serves.

This article constitutes a plea for soldiers to articulate the essential ingredients of their profession and thus return to a central role in controlling its rules. Lawyers are admonished to "do their duty" and articu-

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* The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency. This article is based upon a thesis submitted by the author in partial satisfaction of the requirements for completion of the U.S. Army War College, Carlisle Barracks, Pennsylvania, during academic year 1981-1982.

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lately complete the coupling between international and domestic standards. Productive dialogue between commanders and lawyers is stressed, and the need for reordering our training regarding professional conduct on the battlefield is recognized. The humanitarian and the soldier must "get in step." The more professional our armed forces, the more likely that the goals of the humanitarian will be served.

I. INTRODUCTION

The war crimes trials of World War II are becoming a part of the history books. Nearly ten years have past since the height of the divisive Vietnam conflict. In a process made more difficult by the ideological divisions of the modern world, over one hundred nations under the auspices of the International Committee of the Red Cross participated in drafting proposed new Protocols to the 1949 Geneva Conventions.[1] A major revision of the law of war is in process. The unusual timing of historical and political events requires us to seek a practical articulation of the standard of behavior on the battlefield expected of American soldiers.

Such a standard is the most basic of social contracts. It is an attempt to reconcile military needs with the requirements of humanity. Its expression, to be effective, must reflect the collective conscience of mankind. It must include implementation of international obligations; its aim will be to force certain behavior. Practically, it is a welding point where the raw use of power is joined with the political objective. This standard of combat behavior will unfortunately be written in legal language since ultimately it must be enforced by criminal sanctions. Its expression is the ultimate test for military discipline. A standard that is expressed with certainty, with authority, with concensus, and with directness is the foundation for effective training. A properly articulated and understood standard allows the teaching and preventive functions of the law to be appropriately exercised. Such a standard is the vehicle for discussion of the ethical and moral considerations of war. In short,

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[1] U.S. Dep't of Army, Pamphlet No. 27-1-1, Protocols to the Geneva Conventions of 12 August 1949, p. 122 (1979) [hereinafter cited as DA Pam 27-1-1, Protocols]:

> The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, convened by the Swiss Federal Council, held four sessions in Geneva (from 20 February to 29 March 1974, from 3 February to 18 April 1975, from 21 April to 11 June 1976 and from 17 March to 10 June 1977). The object of the Conference was to study two draft Additional Protocols prepared, after official and private consultations, by the International Committee of the Red Cross and intended to supplement the Four Geneva Conventions of 12 August 1949 . . . .

Id. (This pamphlet contains the text of the Protocols.).

an agreed upon standard is the cornerstone for the application of reasoned moral judgment and the rule of law on the battlefield.

Through the friction and fog of war, it is primarily the authority of the commander which gets things done. States, soldiers, and citizens trust their "all" to him. Never has so much been expected of a commander. Modern technology demands an almost instantaneous consideration of military necessity, humanity, and chivalry. He must distinguish relevant from irrelevant targets, seeking only the destruction of legitimate objectives. He is expected to perform the Solomon-like task of proportioning the amount of military destruction with the military value of the objective. The voices of humanity remind a commander that war is a political weapon. Gratuitous unnecessary suffering or destruction is irrelevant to his military purpose and often counter-productive. Somehow he is to divine the least coercive method. Adding to the complexity, are the remanents of chivalry or professional courtesy which impose upon a representative of a proud military profession lineage and tradition which have their own imperatives.

Prior to World War II, legal standards for commanders were practical articulation of the accepted practice of military professionals. This customary international law expressed soldier's standards which were born on the battlefield and not standards imposed upon them by dilettantes of a different discipline. Undoubtedly, the practicality of these rules led to their general acceptance which in turn was responsible for their codification. Such practical rules were understood and enforced. Following the war crimes trials at the conclusion of World War II, political implications intruded into what had previously been a largely apolitical area. The very words "war crimes" became politically repulsive. Countries such as the United States, while upholding their international obligations, refused to label misconduct on the battlefield war crimes if it could be handled domestically under some common law crime. Breaches of international standards were treated as internal disciplinary matters. Legal standards, appearing under the commonly used label, law of war, became more idealized and less practical. Apolitical soldiers, sensing a political pitfall, began to shun what was once the accepted practice of professionals. Modern law of war is driven by an idealistic internationally minded community. The soldier sees his iron law of war sweetened, lawyerized, politicalized, third world-ized, and made much less practical.

If the international standard is inarticulate, then certainly a soldier should expect his domestic standard ultimately expressed in the Uniform Code of Military Justice to practically assist him. The movement on the domestic law side has been toward civilianizing the Uniform Code of Military Justice. It may be that the country no longer has a soldier's code but a civilian code for soldiers. The Code codifies, with minimum

necessary allowances for the needs of the military services, civilian criminal law. The wisdom of civilian law never really contemplated the judging of criminal actions in battlefield related circumstances. Soldierly needs, especially those which run contrary to everyday social standards, should be clearly enunciated. Unfortunately, they are not.

If there is a lack of practicality in the international standard and if that lack of practicality is coupled with silence in our domestic standard, then there should be genuine cause for alarm. If soldiers do not know what is expected of them, they are unable to teach and require compliance with vague, unarticulated, impractical standards. Even worse, they will have no way to make these vital matters a part of their professional discipline. This article examines both the international and the domestic aspects of expected command behavior in combat in an effort to replace these "ifs" with understanding.

II. THE WHAT, WHY, AND RIPENESS OF COMMAND CRIMINAL RESPONSIBILITY

A. DEFINITION OF COMMAND CRIMINAL RESPONSIBILITY

What is command criminal responsibility? Although historically blurred, command criminal responsibility means specific criminal responsibility of the commander and not the general responsibility of command.[2] Command criminal responsibility is an articulation of an axiom of Justice Oliver Wendel Holmes in describing law as "a statement of the circumstances in which the public force will be brought to bear upon men through the courts."[3] Command criminal responsibility goes beyond personal felonious acts. It assumes that a commander does not issue illegal orders or in some way personally direct or supervise a prohibited activity; such conduct would make the commander a personal participant. It is not personal criminal activity but criminal responsibility for the actions of subordinates or for command decisions affecting others. Command criminal responsibility does require criminal misconduct by the commander and cannot be equated with everything improper that occurs within a command.[4]

Command criminal responsibility, as the name implies, means criminal and not administrative responsibility. It does not mean poor leadership or an ineffective trainer. Commanders can be reprimanded, re-

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[2] Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1, 2 (1973).
[3] American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).
[4] For a concise statement of command responsibility *see*, O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 Geo. L.J. 605, 661 (1972).

lieved, and politically or historically censured for conduct that is not criminal. Nor does it mean imputed criminal responsibility which has been so publically and emotionally misargued by persons with impressive credentials.[5] Command criminal responsibility for actions of subordinates requires personal involvement, connection, knowledge, or intent. The criminal law of civilized nations requires personal involvement. Vicarious punishment is repulsive to a civilized society. Command criminal responsibility does not require that the commander have committed the offense, that he have ordered it done, or that he have enunciated a policy requiring others to do it. Under these circumstances, he would be responsible not just as a commander but as a principal. Command criminal conduct is based on breach of duty. The breach must contribute to the crime in two ways. First, it must be a direct link or proximate cause of the misconduct. The crime would not have been committed but for the breach of duty. Second, the commander must have had the opportunity and ability to prevent the crime.

In addition to these traditional requirements, a new and radical aspect of command criminal responsibility is under active discussion. Under the proposed Protocols, a commander would be criminally responsible if he wilfully employed force in a grossly disproportionate manner.[6] The actions of the commander, indeed his very value judgments, would be at issue.

A nonmilitary example of the traditional requirements is illustrative. Assume for a minute that a patrolman on the streets of New York City, while being jostled by a crowd, unexpectedly pulls his service revolver and shoots a number of innocent bystanders. What is the criminal responsibility of the police commissioner? He may be remiss in the performance of his duties if he has not insured that the particular patrolman received the necessary schooling. Indeed, he may be such a poor administrator that he should be censured or fired. But the question is, is he criminally responsible for that particular act? Certainly if this police commissioner had received reports of one or two similar incidents and did nothing about them, then he might be criminally responsible. He would have breached his duty to control his patrolman. His inaction after being made aware of a series of incidents would amount to a concerted policy and active encouragement to commit similar illegal acts.

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[5] T. Taylor, Nuremberg and Vietnam: An American Tragedy (1970).
[6] DA Pam 27-1-1, Protocols, *supra* note 1, at 63-64.

B. WHY EXAMINE COMMAND CRIMINAL RESPONSIBILITY?

1. The military needs practical guidance.

With the aftermath of World War II and the conclusion of the Vietnam War, our country needs a clear position regarding command criminal responsibility. Is our country ready to impute criminal responsibility to commanders without an evidentiary showing that they had knowledge of the event and had the physical ability to do something about it? Are we prepared to risk the professional reputation of our military and our country's good name on the altar of a "war crimes trial debate" when a commander orders an attack that a politically motivated "Monday morning quarterback" would say was wrong? Are we willing to have command criminal responsibility resolved by publicity seeking politicians, ambitious prosecutors, unguided judges, or untutored vengeful citizens (perhaps even those of our enemy)? In this troubled world so filled with potential conflict, are we prepared to forego the preventive function of the law that the articulation of a standard produces? Knowledge of a standard should become the goal for compliance and would allow normal training to insure its corporate understanding.

This issue should be discussed and resolved at a time when our country is not faced with a particular problem and at a time when pressures to arrive at a politically expedient solution are not present. The diverse voices of reason must be allowed the freedom to express themselves. Such a clarification would be a shield to protect commanders as well as a sword for their prosecution. Our country should arrive at a position regarding command criminal responsibility in a calm, deliberate, detached manner unaffected by a particular incident.

2. We are a nation and a people governed by law.

Our forefathers began an era of world revolution in our War of Independence. Our revolution, which inspired and changed the world, was a revolution of ideas and not of people. Our concepts of liberty, of equality, and of justice set the world on fire. The hallmark of our people became a respect for the rule of law. This tradition is an important part of our military heritage. A part of this proud tradition for the American Army is the Lieber Code of 1863.[7] President Abraham Lincoln, on his own initiative, commissioned Professor Francis Lieber, the father of a future Judge Advocate General, to draft the first code dealing with prisoners of war. This code, which required humane treatment for prisoners of war, served as a model for countries throughout the world. It

[7] Gen. Orders No. 100, U.S. War Dep't (24 Apr. 1863).

has been characterized as "not only the first but the best book of regulations on the subject ever issued by an individual nation on its own initiative." [8] Although little known and unheralded, that same tradition continued through the Vietnam conflict. The regulatory scheme used by the American Army in Vietnam to identify, to investigate, and to report war crimes is studied as a model in the community of nations. In commenting upon this directive, the International Committee of the Red Cross delegate to Saigon stated:

> The MACV instruction . . . is a brilliant expression of a liberal and realistic attitude . . . . This text could very well be a most important one in the history of the humanitarian law, for *it is the first time . . . that a government goes far beyond the requirements of the Geneva Convention in an official instruction to its armed forces.* The dreams of today are the realities of tomorrow, and the day those definitions or similar ones will become embodied in an international treaty . . . will be a great one for all persons concerned about the protection of men who cannot protect themselves . . . . May it then be remembered that this light first shone in the darkness of this tragic war of Vietnam. (emphasis added).[9]

Our military tradition of respect for the law is well summarized in a quotation that appeared on the first page of a book marking the two-hundredth anniversary of the Army Judge Advocate General's Corps:

> War has been said to be an impersonal thing, and in many respects it is. However, armies are necessarily composed of human beings—who perform or influence the performance of great actions; who bring new growth and new challenge; and who have the capacity to leave a legacy of honor, hard work and respect for the law.[10]

This tradition coupled with our respect for the rule of law demands an expressed, articulate, acceptable, workable, and practical standard of command criminal responsibility.

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[8] J. Spaight, War Rights on Land 14 (1911). Cited and discussed in Gibb, *The Applicability of the Laws of Land Warfare to U.S. Army Aviation*, 73 Mil. L. Rev. 25, 26 (1976).

[9] Haight, *The Geneva Convention and The Shadow War*, U.S. Naval Institute Proceedings 47 (Sept. 1968), quoted in Solf, *A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy*, 5 Akron L. Rev. 43, 52 (1972). (The referenced directive is Vietnam Directive No. 381-46, Military Assistance Command (27 Dec. 1967)). See generally, Baxter, *The Evolving Laws of Armed Conflicts*, 60 Mil. L. Rev. 99, 106 (1973).

[10] Dep't of the Army, The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975, p. 1 (1975).

3. Command responsibility is the heart of military professionalism.

There are four distinguishing characteristics of a combatant: (1) commanded by a person responsible for his subordinates; (2) has a fixed distinctive sign (be uniformed); (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war.[11] A responsible commander heads the list. A combatant is not always a professional, yet even here international rules underscore responsible leadership. The American soldier is much more than a combatant. He stands proudly before his countrymen and proclaims that he is a professional. His professionalism is based on two ingredients. The first ingredient is discipline. The second ingredient is the trained and restrained use of deadly force. Indeed, a doctor who has a cancer patient on the operating table will very carefully extract from that patient the cancer using every amount of professional skill and knowledge that he possesses. He does his utmost to insure that when the cancer is removed as little harm as possible is done to the patient's body. The same is true with the soldier, only his task is more difficult. His government calls upon him to remove a political cancer. Unlike the doctor, he must rely upon the discipline and training of the men under his command to execute his exacting requirements. Controlling others through training, discipline, and supervision, he removes that political cancer doing the least damage possible to the body politic. Hence the very heart of military professionalism is command responsibility. Essential fundamentals cannot be assumed, remain inarticulated, or be temporarily malleable. It is in the interest of the military professional to require an exact articulation of the standard expected of him. His duties and responsibilities should be clearly delineated in advance.

C. *The Timeliness of Debating Command Criminal Responsibility*

Public issues must await their time. Politics is the art of the possible. Public interest dictates the political agenda. Some subjects are untimely; others are too emotional or situation centered for long term resolution. In short, the "time" must be right. Several factors indicate that *now* is the time to debate and resolve the issue of command criminal responsibility.

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[11] These factors entitle a guerilla to prisoner of war status. *See* U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare 25 (1956) [hereinafter cited as FM 27-10]. This manual provides "authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land . . . ." *Id.* at 3.

1. Appropriate passage of time since the Vietnam War.

The emotional experience of Vietnam for years paralyzed or froze any progressive discussion of command criminal responsibility. Intellectual camps, warring with pen and paper, rarely listen to each other as they try to checkmate their political opposition.[12] Emotion also hinders flexible judgment. Only recently has their been indication of a more balanced approach which is so necessary to the movement of controversial, legally related ideas.[13]

2. The Third World Revolution has hit and may have mortally wounded the law of war.

It is obvious to the most casual observer that the accepted tenets of the established order have been badly shaken by the ideas, economic interest, and collective power of the third world. In matters relating to the law of war, newly created governments insist that their interests were not represented in the earlier portions of this century when white colonial Europeans in diplomatically correct morning coats met in Baroque palaces to establish the rules for the proper conduct of warfare. These Marquis of Queensberry rules are rejected as irrelevant, impractical, or intentionally detrimental. The "have - have not" debate is especially acute with modern sophisticated military hardware and how it should be employed. A different and equally pernicious political ingredient threatens to undo the political consensus so necessary for the proper functioning of the law of war. This cancer can be easily seen in recent meetings of the International Committee of the Red Cross where large portions of the agenda were devoted to an irrelevant, political circus, often on who should be seated.[14] In short, such conduct is a polarization that detracts from the necessary consensus building process.

3. Evolving role of the military.

The purpose of the military is to prevent or to win wars. Yet in the nuclear age the professional military is beginning to be regarded as conflict controllers. The American Army publically discusses concepts of conflict prevention, conflict control, and conflict termination.[15] There is a realization that a modern war could result in the destruction of the very objectives desired to be preserved. There appears to be a searching for a means for nations to compete in lower thresholds of conflict. A clear

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[12] Solf, *supra* note 9, at 43. See generally T. Taylor, *supra* note 5.

[13] *See* G. Lewy, American in Vietnam (1981).

[14] Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 Harv. Int'l L.J. 1 (1975). *See also* Hazard, International Law Under Contemporary Pressures, 83 Mil. L. Rev. 1 (1979).

[15] *See* U.S. Dep't of Army, Field Manual No. 100-1, The Army 8-9 (1981).

understanding of the rules surrounding conflict would help in this regard.

4. Restoration of public confidence.

Nothing is more dangerous in a democracy than the erosion of the bond between the armed forces and the citizenry it serves. One of the festering sores of Vietnam concerned professional conduct on the battlefield. The professional military watched in bewilderment as one segment of the population condemned the most sensitive, difficult, and skillfully executed of military combat operations as blatant war crimes. The other segment saw nothing wrong with the shooting of unarmed, unresisting noncombatants and condemned as unpatriotic and unnatural any attempt to discipline those who so obviously broke the rules. The bond of understanding between the military and its citizenry must be rejuvenated before the professionalism of our armed forces is again a matter of public debate.

5. Isolation on the future battlefield.

Isolated small units under tremendous pressure and without customary guidance may well fight the next war. Resulting difficulties are a matter of experience in counterinsurgency operations. The sophisticated European battlefield with its high speed tactics, with its electronic communications difficulty, and with its resulting chaos if tactical nuclear weapons are employed, point toward units as small as platoons fighting the war. In such circumstances, basic discipline and a clear understanding of the rules of warfare are a must if the integrity of our Army is to be upheld.

6. We are being asked to ratify new Protocols.

We are being asked to take a major step in the law of war. The ramifications of this step are awesome. Commanders, and their civilian masters, would be required to demonstrate good faith competence in their value judgments regarding proportionality—that delicate and difficult middle ground between military necessity and the requirements of humanity. Willful failure to strike the correct balance would be a war crime. Vague concepts of "indiscriminate attack" and "excessive injury" will undoubtedly be debated with the possibility of Nuremberg-like war crimes prosecution threatened in the background. Should our country ascribe to these Protocols? If so, how may they be practically implemented? Disinterested silence by commanders would be disastrous.

7. Internationalism in the law of war may have hit its peak: the future could lie in articulating workable and acceptable domestic standards.

On a post-Nuremberg battlefield, a "spade is no longer a spade." Countries shy away from even using the words "war crime." Instead, they use

their domestic criminal law to resolve criminal misconduct on the battlefield. The Third World Revolution may have ended any collective progress and destroyed any consensus that ever existed in this fragile area. Serious consideration should be given to placing our major effort in articulating our domestic standard with the realization that history teaches that we can expect large numbers of the other countries of the world to emulate our example.

III. COMMAND CRIMINAL RESPONSIBILITY

Logically, two broad categories appear when one considers command criminal responsibility.[16] Although the first category is long recognized, its contents and parameters are not well articulated. It evolves around the concept of a commander being responsible for the control of his subordinates or of a commander being responsible for the discipline of personnel under his command. When a subordinate runs amuck, what are the commander's personal criminal responsibilities? Training is the prophylactic; command oversight is the required official function. The second category is a new concept with its genesis in the new proposed Protocols to the Geneva Conventions.[17] Rather than codifying existing international military practice as has been the custom in the past, the proposed Protocols seek to establish a new humanitarian law of armed conflict. This new humanitarian law focuses on the criminal responsibility of a commander for certain combat crimes.[18] This criminal codification flows from the old targeting concepts of necessity and proportionality. These new rules seek to give commanders uniform guidance and to require, under domestic criminal penalty, the exercise of combat military value judgments as decreed appropriate by the humanitarians who control the rules. This is the ultimate expression of command criminal responsibility, for a commander is to be held criminally responsible for his personal value judgment combat decisions.

A. SUBORDINATE MISCONDUCT

Perhaps the best method of studying the current state of the law and the deficiencies in the legal articulation of command criminal responsibility comes from an examination of the much discussed and misunderstood *Medina* case which was a part of the My Lai tragedy.[19] This case,

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[16] Appropriate organization of diverse material is always a problem. I have chosen to subdivide command criminal responsibility into a commander's responsibility for subordinate misconduct and for personal actions and decisions. Future articulation could use other organizational forms. The "law" may be more comfortable with the distinction of commission and omission or malfeasance and misfeasance.

[17] *See generally* DA Pam 27-1-1, Protocols, *supra* note 1.

[18] *Id.* at 63-64.

[19] Captain Ernest L. Medina was acquitted on 22 September 1971 of charges alleging his misconduct during the My Lai massacre on 16 March 1968.

more than any other case in our legal history, is synonymous with command criminal responsibility. An examination of the facts, coupled with the deficiencies that exist in the available prosecutorial theory, will be instructive and will contribute to the post-*Medina* debate concerning command criminal responsibility.[20]

On the morning of 16 March 1968, Charlie Company, of Task Force Barker of the 11th Brigade of the Americal Division, conducted an assault in an area known as Pinkville in Quang Nai province in the Republic of South Vietnam. Captain Ernest Medina was in command of that company and was the senior commander on the ground. Lieutenant William Calley commanded the first platoon. Believing that they would meet stiff resistance from a Viet Cong battalion, Captain Medina gave his men a pep talk on the evening of 15 March 1968 prior to the assault the following morning. Captain Medina attempted to prepare his men psychologically for the fierce fight he expected the next day. The prosecution did not believe that Captain Medina, during that particular briefing, intentionally ordered his men to kill unarmed, unresisting, noncombatants. On the morning of 16 March 1968, the company landed outside of the village of My Lai. For all practical purposes, the helicopter-borne assault met no resistance. Once the company was on the ground, the three platoons began to make their sweep through the village. The horrible events that followed in the course of the next three hours are now history. Several hundred old men, women, and children were systematically killed. Two particularly large groups were gathered together and executed by Lieutenant Calley and an enlisted man by the name of Paul Meadlo. Various other instances of individual killings occurred throughout the village area. The village was burned. Women were raped and otherwise sexually molested. Indeed, five hundred South Vietnamese may well have lost their lives.

During these particular three hours, Captain Medina remained on the outskirts of the village. No evidence placed Captain Medina at the scene of any of these killings. The incident occurred in dense jungle growth. However, since the area involved was approximately ten thousand square yards, the size of some five football fields, the prosecution's position was that Captain Medina knew precisely what was transpiring and that he had the ability to issue orders stopping the slaughter and to seek help in controlling his men. In short, the prosecution felt that he had actual knowledge that unarmed, unresisting, noncombatants were being killed by men under his command. The evidence was clear that he had

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[20] *See, e.g.*, Clark, *Medina: An Essay on the Principles of Criminal Liability for Homicide*, 5 Rut.-Cam. L. Rev. 59 (1973). *See also* Howard, *Command Responsibility for War Crimes*, J. Pub. L. 7 (1972) *and* Lewy, *supra* note at 13, at 359-362.

the communications ability to stop this carnage. He had two basic choices. He could have taken affirmative action, for example, issuing orders or seeking help to control his men. Seeking assistance would, of course, have reflected poorly on his military leadership ability. The other course of action would be to remain silent and hope that the incident would be relatively insignificant and would not be discovered. Apparently, he chose his military career over the lives of unarmed, unresisting, noncombatants who were being slaughtered by his troops within earshot. His crime, in the prosecution's eyes, was abandoning his command responsibility on the battlefield.[21]

As can be seen, the *Medina* case was a case of nonfeasance—command inaction in the control of subordinates who were committing atrocities. Had there been credible proof that he ordered this carnage, the legal theory would have been clear. By his personal participation, he would have been a principal in the crimes committed. Hence, the *Medina* incident is a classic case of command criminal responsibility. His involvement in this incident and his knowledge of it was based upon circumstantial evidence—a factor likely to be present in future cases. The statute of limitations required a quick drafting and preferring of charges. In later examining the facts surrounding My Lai, the prosecution became suspicious when, almost without exception, the only people who alleged that Captain Medina had ordered the killing of noncombatants were soldiers who themselves had killed numerous women and children. In mid-October of 1970, the defense requested a polygraphic examination for Captain Medina. The government examiner, as Mr. F. Lee Bailey later established on the record, was perhaps the most competent examiner in existence. This test concluded that Captain Medina "*was* truthful when he denied ordering or intentionally inferring to his company during his briefing of 15 March 1968, that non-combatants be killed." However, using a peak of tension technique, the same test concluded,

> that Medina *was not* truthful when he denied knowing that his company had killed numerous non-combatants at My Lai (4) prior to 0930 hours, 16 March 1968, and was aware that his company was killing numerous non-combatants at My Lai (4) between the hours of 0730 and 0900, 16 March 1968.[22]

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[21] The author was the Chief Prosecutor in the *Medina* case. *See generally* W.R. Peers, the My Lai Inquiry (1979); Cooper, *My Lai and Military Justice—To What Effect?*, 59 Mil. L. Rev. 93 (1973). *But see* Hersh, My Lai 4 (1970) *and* Hammer, One Morning in the War (1970) (Sources of questionable accuracy since statements made to investigative reporters were often at great variance with statements repeated to prosecutorial officials and with testimony given under oath.). See generally F. Lee Bailey, For the Defense 125-128 (1975) and M. McCarthy, Medina (1972).

[22] Polygraph Examination Report, Subject: Medina, Ernest Lou, 25 November 1970, Case Control No. 70-CID011-00013, Robert A. Brisentine, Jr., Examiner, Criminal Rec-

Captain Medina admitted that after an initial radio message he had no reason to believe My Lai was contested by the enemy and that he had lost control of his company. He also admitted that he had not issued a cease fire order for nearly three hours after the assault began. The prosecution's obligation was both clear and complex.

1. Duty to Intervene.

Self-evident common sense dictates that a responsible commander must control his troops. Control includes as a minimum a duty to interfere if they behave improperly. This duty also encompasses a requirement to supervise, a duty to find out what is transpiring. There is no room in the concept of command for a "stick your head in the sand" approach.

Action is the fundamental principle of the criminal law. A person who acts contrary to the clearly articulated accepted norms of society will be punished. Commission, contrary to the rules, and not omission drives the criminal law. Since criminal omission is unusual, criminal acts grounded in inaction should be even more carefully defined. Making an overt act criminal is one thing; sending someone to prison for passive conduct is quite another. Criminal inaction is usually based upon a breach of a legal duty. Logic would dictate that such a duty should be painstakingly articulated. Fundamental fairness would seem to demand it. Where is the definition of the duty which embodies the cornerstone of responsible command? Where is the explanation of the consequences of such a breach? Surely such an important matter should not only be articulately expressed but carefully taught to each officer siezed with or aspiring to such duty. Frighteningly, such is not the case.

A search by the *Medina* prosecutors revealed no direct statement of this duty. They found no clear articulation of the principle and were forced to weave and to modify isolated portions from dated military field manuals and to rely upon tangential dicta by the military courts. Shockingly, a commander's responsibility had to be boosted by "bootstrapping" his individual responsibility on top of his command responsibility to give it more depth.[23] The trial judge in a later public discussion

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ords Branch, U.S. Army Investigative Records Repository, Fort Holabird, Maryland 21219. The conclusions of polygraphic examinations are inadmissible in courts-martial. Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 142e [hereinafter cited as MCM, 1969]. Hence, the prosecution could not seek admission into evidence of the results of the peak of tension test. The prosecution, did make extensive use of the oral statements of Captain Medina to Mr. Brisentine. Mr. F. Lee Bailey publically contends that Captain Medina "passed" a polygraph examination. Bailey, *In Defense of Military Justice*, Army 11-13 (Nov. 1981).

[23] See Appendix A for the portion of the prosecution brief on the law of principals in *United States v. Medina* detailing the duties of a combat commander. CPT Franklin R. Wurtzel, Assistant Trial Counsel, participated in the drafting of this brief.

of his legal analysis of the case, noted that "there is no applicable common law theory establishing a duty by a commander to interfere."[24] In his judgment, "the international law which by adoption becomes domestic law does place such a duty" on commanders.[25] The trial judge's articulation of this duty in his instructions to the *Medina* court members is a comprehensive domestic statement:

> In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. *Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war.* You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities. (emphasis added).[26]

Unfortunately, the passage of ten years since these instructions were given has resulted in no domestic progress in the articulation of a commander's unique duty to interfere. The Uniform Code of Military Justice is silent. The Manual for Courts-Martial does not mention this duty and only tangencially brushes the issue.[27] On the rare occasions when the

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[24] Howard, *supra* note 19, at 21.

[25] *Id.*

[26] Instructions to the Court Members, United States v. Medina, Appellate Exhibit XCIII, p. 18.

[27] MCM, 1969, *supra* note 22, at para. 156:

> While merely witnessing a crime without intervention does not make a person a party to its commission, if he had a duty to interfere and his noninterference was designed by him to operate and did operate as an encouragement to or protection of the perpetrator, he is a principal.

See also U.S. Dep't of Army, Pamphlet No. 27-2, Analysis of Contents—Manual for Courts-Martial, United States 1969, Revised Edition (1970). The analysis indicates that the

military courts have been faced with cases involving the uniqueness of officers, their pronouncements have been brief, conclusory, and nondefinitive.[28] Analogous situations in the common law are almost nonexistent. Relevant cases relate to special circumstances for individuals enforcing the law [29] or for persons with close relationships.[30] Military manuals which should express the custom of the service are also disquietingly silent. Particularly troubling is the silence of Field Manual 27-10, *The Law of Land Warfare*, which provides "authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land." [31]

However, some progress in the international articulation of the duty of commanders comes in Article 87 of the proposed Protocols. Governments are obligated to require commanders to prevent, to suppress, and to report breaches of the basic Conventions and of the Protocol. Governments must also require commanders, commensurate with their level of responsibility, to ensure that soldiers under their command are aware of their obligations under the Conventions and the Protocol. In the relevant third paragraph, governments are to require

> any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such

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target was a governmental guard or sentinel, not an explicit combat example. However, the analysis additionally states: "Inaction cannot be substituted for the required intent, although it may be evidence of that intent." *Id.* at 158.

[28] *See, e.g.*, United States v. Waluski, 6 C.M.A. 724, 21 C.M.R. 46 (1956) (military superior is responsible for the proper performance by his subordinates of their duties); United States v. Floyd, 18 C.M.R. 362 (A.B.R. 1955) senior prisoner of war in a Korean prisoner of war camp had the responsibility and the duty to take action); United States v. Cowan, 12 C.M.R. 374 (A.B.R. 1953) (officer has duty to intervene and stop illegal conduct by subordinates in watching obscene motion picture); United States v. Anderson, 15 C.M.R. 919 (A.F.B.R. 1954) (officer using airplane for illegal transport has a duty to correctly clarify an ambiguous situation); United States v. Peterson, 16 C.M.R. 565 (A.F.B.R. 1954) (disbursing officer has a duty to stop illegal activity); United States v. Barker, 13 C.M.R. 472 (A.B.R. 1953) (guard on prison detail has a duty to intervene and prevent one prisoner from committing sodomy upon another). *But see* United States v. McCarthy, 11 C.M.A. 758, 29 C.M.R. 574 (1960) (lieutenant passenger in car, in social setting, was not held responsible for the larcency of hubcaps by enlisted passengers without proof of active involvement).

[29] *See, e.g.*, Powell v. United States, 2 F.2d 47 (4th Cir. 1924) (train conductor is responsible for liquor being transported on his train). *See also* Collins v. United States, 65 F.2d 545 (5th Cir. 1933).

[30] *See, e.g.*, People v. Blackwood, 35 Cal. App. 2d 728, 96 P.2d 982 (1939) (wife stood by with drawn pistol while husband shot two neighbors); People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907) (man failed to summon medical aid for his mistress when she collapsed after taking morphine in the course of a drunken debauch); Mobley v. State, 85 N.E.2d 489 (1949) (mother failed to stop beatings of child); The Queen v. Bubb & Hook, 4 Cox Crim. Cas. 455 (1850); The King v. Gibbins & Proctor, 13 Crim. App. 134 (1918) (parents failed to feed child and child starved to death).

[31] FM 27-10, *supra* note 11, at 3.

> steps as are necessary to prevent such violations of the Conventions or this Protocol, and where appropriate, to initiate disciplinary or penal action against the violators thereof.[32]

Note the use of the word "aware" which connotates actual knowledge, and a matter to be discussed in the next section. The affirmative duty to actively supervise those under his control is stressed.[33] A commander has a duty to initiate appropriate steps if he is aware of a breach or of an intended breach. It should also be observed that this Article applies "to any military person who has members of the armed forces under his command." [34] Hence, it was drafted to include noncommissioned officers but only requires soldiers to act within the scope of their command authority. The drafters felt that this "language does insulate commanders more effectively from frivolous or politically motivated war crime allegations." [35] Implementation or domestic articulation, obviously, is required.

Such a fundamental concept screams to be articulated. Must we wait until we are faced with an embarassing incident to hurriedly, under pressure and with incident myopia, formulate a legal articulation designed to be a part of a prosecution's case? If this is a valid legal principle, why as a measure of professionalism, is not every new officer and noncommissioned officer *taught* about the unique duty imposed upon him? [36]

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[32] DA Pam 27-1-1, Protocols, *supra* note 1, at 65.

[33] *See also* H. Hansell, Memorandum to The Secretary (Defense); Subject: Circular 175, Request for Authorization to Sign Two Protocols to the Geneva Conventions of 1949 for the Protection of Victims of War [hereinafter cited as Protocol Analysis]. The analysis of subparagraph 3 of Article 85 indicates:

> This provision has been added to the stress the commander's responsibility to take affirmative action in the supervision and control of members of the armed forces under his command or other persons who are under his control. . . . [I]t is designed to provide a duty of commander to intervene when they are aware of a breach or a planned breach. The provision requires the commander to take reasonable measures in the supervision and control of his personnel so that if breaches are being permitted, he will become aware of them.

Id. at p. I-87-5.

[34] *Id.* at p. I-87-6.

[35] *Id.* at p. I-87-3.

[36] The duty discussed in this section concerns the duty of a commander to supervise and to control his subordinates. Commensurate with their levels of responsibility, commanders are expected to prevent, to suppress, and to report war crimes. This statement may be an unnecessarily narrow view of a commander's duty. Should this duty affirmatively state that a commander has a duty to fight his troops in accordance with professional standards? Should this duty include requirements to train soldiers regarding professional standards? Should active observation be a requirement? What would be the consequences of breach of an expanded duty? In short, I have presented a more limited view of a commander's duty. In my judgment, clear and accepted articulation of this narrow duty is a necessary building block for any possible expansion of this concept.

2. Knowledge.

The issue, both factually and legally, in the *Medina* case was knowledge. What did he know and when did he know it? This fundamental question will undoubtedly be the central issue in cases involving command criminal responsibility. Factually the framing of this issue has been presented above.[37] Legally, this issue evolved around the cursory, unamplified subordinate clause of one of four sentences of the FM 27-10 paragraph entitled "Responsibility for Acts of Subordinates in the Law of Land Warfare":

> The commander is also responsible if he has actual knowledge, *or should have knowledge*, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violator thereof. (emphasis added).[38]

An amplification of the words "should have knowledge" would have prevented much legal difficulty and would have eliminated many attacks on the so-called "flawed" instructions of the court which supposedly were a part of a conspiracy by the Army to whitewash the My Lai incident by propounding different standards for itself than it required of conquered foes after World War II.[39] The real irony is that this "should have known" standard was considered too broad and one that would subject the commander to arbitrary after-the-fact judgments concerning what he should have known by the international community when they drafted the article concerning a commander's failure to act.[40]

Knowledge is and will continue to be the primary issue in cases involving command criminal responsibility.[41] A person with the power of life and death over others must be accountable for his acts. Yet, fairness in determining criminal accountability would require some personal involvement on the part of the commander. This personal involvement is often expressed as guilty mind, mens rea, intent, design, or any number of nouns denoting involvement. Knowledge is the umbrella often used to express this concept. Courts will scrutinize the peculiar circumstances of linkage because of the unusual nature of criminal offenses based upon inaction. Popular pressure, both from the public and within the military,

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[37] See Section III, A. of text.

[38] FM 27-10, *supra* note 11, at p. 178.

[39] T. Taylor, *The Course of Military Justice*, N.Y. Times, Feb. 2, 1972, at 37. *See also* G. Lewy, *supra* note 13, at 359-361.

[40] DA Pam 27-1-1, Protocols, *supra* note 1, at 65; Protocol Analysis, *supra* note 33, at p. I-86-1.

[41] *See, e.g.*, United States v. Goldman, 43 C.M.R. 711 (A.C.M.R. 1970).

will be to find a responsible commander. The tension between these two often divergent requirements produces the knowledge debate.

The unhelpful inarticulateness of the "should have known" standard is distressingly obvious. One expert publically stated:

> [I]f one were to apply to Dean Rusk, Robert McNamara, McGeorge Bundy, Walt Rostow and General William Westmoreland the same standards that were applied in the trial of General Tomoyuki Yamashita 'there would be a very strong possibility that they would come to the same end as he did.' [42]

Such apparently politically motivated rhetoric seeking a responsible scapegoat is dangerously near the vicarious liability standard. The public is left to deduce from this expert that General Yamashita was convicted without having knowledge that his subordinates were committing atrocities and that American generals and civilian leaders should be held to the same standard. An analysis of the *Yamashita* case reveals that there was in fact credible evidence of knowledge on his part.[43]

The legal writers who have discussed the problem of knowledge have largely contented themselves with a jurisprudential historical trail.[44] One nonlegal writer suggested that "a commander can be held liable for the actions of his troops if he knows of them or blatantly ignores and fails to take appropriate action." [45] The acknowledged controversy with this "blatantly ignores" standard is the lack of judicial guidance regarding "the degree of efficiency required from the commander in preventing war crimes, in discovering information about them, and in punishing wrongdoers." [46] "Blatantly ignores" does not take into account the foreseeability, and the reasonableness under the circumstances required in negligent instances of command dereliction.[47]

Captain Medina was charged as a principal to murder. He was not charged with dereliction of duty because of the statute of limitations problem and because dereliction of duty was an unattractive offense for such a serious incident. In this case of inaction, knowledge was the link of the suspect to the offense. The prosecution took the position that for

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[42] Solf, *supra* note 9, at 43-44 (remarks of Telford Taylor).

[43] *See* Parks, *supra* note 2, at 22-38; O'Brien, *supra* note 4, at 625-627; Hart, *Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised*, Naval War C. Rev., Sept.-Oct. 1972, at 19-36. *But see* L. Taylor, A Trial of Generals: Homma, Yamashita, McArthur (1981).

[44] *E.g.*, Parks, *supra* note 2, at 77-104; O'Brien, *supra* note 4, at 619-629; Paust, *My Lai and Vietman: Norms, Myths and Leader Responsibility*, 57 Mil. L. Rev. 99, 175-185 (1972).

[45] Hart, *supra* note 43, at 33.

[46] *Id.* at 34.

[47] Paust, *The Barometer*, Naval War C. Rev, Jan.-Feb. 1973, at 103.

intentional homicide offenses "knew or should have known" meant actual knowledge. Such actual knowledge could, of course, be proven by circumstantial evidence. The judge instructed:

> [T]his required knowledge on the part of the accused, like any other fact, may be proved by circumstantial evidence; that is by evidence of facts or circumstances from which it may be justifiably inferred that the accused [had] such knowledge.[48]

From the mosaic of factual evidence presented, which was extensively summarized by the judge,[49] the members of the court were to determine if actual knowledge was present. The use of the actual knowledge test has been much criticized.[50] One articulate scholar noted: "The actual knowledge test, in a context like My Lai, is an invitation to the commander to see and hear no evil." [51]

The debate concerning the meaning of the mercurial "should have known standard" may well have been resolved in an unexpected forum. The relevant paragraph of Article 86 of the proposed Protocols entitled Failure to Act states:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they *knew*, or *had information which should have enabled them to conclude in the circumstances at the time*, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[52]

The analysis concedes that this proposed Article is not as strong as the "should have known" test. It notes that the new standard is "more narrow" and "requires some showing that specific information was available to the commander which would give him notice of the breach." [53] Interestingly, many delegates argued that the "should have known" test "was too broad and would subject the commander to arbitrary after-the-fact judgments concerning what he should have known." [54]

Once again domestic augmentation is necessary. The lessons resulting from past inarticulation simply must be corrected. The issue of knowl-

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[48] Instruction to Court Members, *supra* note 26, at 24.

[49] Judge Howard's summary of the evidence presented at trial surrounding the crucial question of knowledge is both accurate and concise. See Appendix B.

[50] See note 39 *supra*.

[51] Clark, *supra* note 20, at 78.

[52] DA Pam 27-1-1, Protocols, *supra* note 1, at 65.

[53] Protocol Analysis, *supra* note 33, at p. I-86-2.

[54] *Id.* at p. I-86-1.

edge will be the fulcrum in any future trial. Accordingly, the knowledge expected of an officer or of a noncommissioned officer must be precisely defined, especially in light of much public misunderstanding.[55]

3. Possible Violation of the Criminal Law.

The civilian-oriented Uniform Code of Military Justice does little to assist in legally categorizing possible breaches of command responsibility. No article of the Code concerns the battlefield responsibility of a commander. The Manual for Courts-Martial is equally and painfully silent. One must make the legislatively-expressed, ancient common law work, although it teaches little regarding the terrors and the pressures of the battlefield. This recognized deficiency has lead some to suggest that the military needs a separate code applicable to combat violations.[56]

Breach of a commander's duty usually falls into two broad categories: willful and negligent. Negligence, of course, can be performing a duty in a culpably inefficient manner as well as a failure to perform that duty. Willful violations arise when a commander joins or associates himself with the improper acts of his subordinates. A commander could be more or less culpable than his subordinate. In willful violations he must be actively involved. In the words of Article 77 of the Code, he must aid, abet, counsel, command, procure, or cause. In short, his action or inaction must link him with the misconduct. He must designedly encourage or protect the perpetrators. By contrast, dereliction of duty, in violating Article 92 of the Uniform Code of Military Justice, indicates that a person may be derelict in the performance of his duties when he wilfully or negligently fails to perform them or performs them in a culpably negligent manner. Here the focus is on the commander and his breach of duty. No attempt is made to link him as a principal with the conduct of others. Two problems make dereliction of duty an unattractive prosecutorial choice. The current maximum punishment for enlisted members is three months confinement at hard labor with forfeiture of two-thirds pay per month for three months. This is not the sort of punishment normally considered appropriate for battlefield homicides. In addition, a

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[55] Command criminal responsibility presupposes not only knowledge but also the ability to intervene to prevent, correct, or punish. Any future criminal articulation should include a defense of physical inability to determine what is transpiring or inability to control subordinates. Because modern communication is so efficient, consideration should be given to placing the burden of going forward with the evidence on the accused.

[56] Major General Walter D. Reed (formerly The Judge Advocate General, U.S. Air Force) suggested a separate code in a law of war panel held at The Judge Advocate General's School, Charlottesville, Virginia on 6 April 1978. *Law of War Panel: Directions in the Development of the Law of War*, 82 Mil. L. Rev. 3, 35 (1978). *See also* Prugh & Westmoreland, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat (A Draft Code Amendment)*, 3 Harv. J. of L. & Pub. Pol'y 1 (1980) (Draft Code Amendment appears at 4 Harv. J. of L. & Pub. Pol'y 199 (1981)).

two year statute of limitations is applicable.[57] This is not an insignificant problem if there has been a cover-up or the crime is not discovered for some time.

The *Medina* case demonstrates the worst of these problems. The prosecution contended that Captain Medina was guilty of murder as a principal. His inaction in intentionally failing to intervene after learning that innocent noncombatants were being killed caused the death of not less than one hundred Vietnamese. To the prosecution this was a calculated act of murder. The judge, however, excluded the intentional aspects and reduced the negligence to that of culpable negligence found in involuntary manslaughter. This action has been articulately criticized as depriving the jury of permissible, alternative routes to conviction involving intentional homicide offenses.[58]

A criminal trial is an attempt to prove that an individual violated an understandable section of the criminal law. Prosecutors should spend their time gathering facts and not attempting to articulate a theory of prosecution. Articulating what is a breach of the criminal law is a legislative not an executive or prosecutorial function. The mixture of such functions is illegitimate and dangerous. Our country and our armed forces need a specified section of the criminal code which would leave to the military judicial system only the task of seeing if the facts supported the charge.

B. PERSONAL ACTIONS AND DECISIONS

1. Traditional Concepts.

Areas to be given emphasis. Commanders have long been expected to perform certain battlefield functions and to take certain actions in combat. When these items are enumerated by legal advisers, commanders who agree with that advise often exclaim: "But that's not a legal matter!" The law to them so reflects what professional soldiers expect that it ceases to be a legal requirement or to be a matter within the providence of a lawyer. Were it that all the rules dealing with the battlefield were so in harmony with accepted practice! There are five basic areas which should be taught to and given emphasis by every serviceman who leads others:

a. Professional training. The personal and collective discipline that comes from hard, challenging, and meaningful training is the first ingredient of a professional soldier. A well-trained, disciplined, and motivated soldier will behave correctly under stress. The discipline this training in-

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[57] Uniform Code of Military Justice art. 43, 10 U.S.C. § 843 (1976).
[58] *See* Clark, *supra* note 20, at 72-77 (1973).

duces makes him a professional and sets him apart. It insures professional conduct on the battlefield.

b. Compliance with the rules of engagement. The commander must know, understand, and enforce compliance with the rules of engagement. These rules set forth the manner in which conflicts are to be fought. Any unusual legal requirements will more than likely be incorporated.

c. Compliance with standard operating procedures. The commander must insist on compliance with standard operating procedures. In times of crisis, emotion and pressure, a disciplined, well-thoughtout standing procedure will often save the day. Such procedures follow the reasoned path of others.

d. Control of subordinates. Subordinates should be controlled with the issuance of clear, concise orders. Superiors should actively intervene at the first sign of lack of discipline.

e. Insist upon the truthful, moral "high road." A commander by thought, word and deed must convey to his subordinates that he expects them to appropriately exercise their morality and common sense.

Supervise trouble spots. In addition to these almost self-evident areas of emphasis, a commander must actively supervise certain trouble spots. He must have a system to insure that these trouble spots are handled professionally. The rationale for such a system should *not* be because it is a legal requirement, but because it is the expected conduct of a disciplined, professional soldier.

a. Watch the forbidden T's—targets, tactics, and techniques. Commanders should insure that their subordinates know who and what to target, know the expected tactics, and know the acceptable techniques to accomplish the objective. A negative approach is probably the easiest. Don't target noncombatants, protected property, or shoot at medical service symbols. Don't use poison or poisoned weapons. Don't alter your weapons to increase suffering.

b. Watch the process of capturing enemy soldiers. Insure that they are allowed to surrender, are treatd correctly and humanely, and are not impermissively interrogated.

c. Insist upon respect for civilian and private property.

d. Know what to do when crimes are committed and do it! Insist upon supervision. Seek the prevention of criminal acts.[59]

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[59] *See generally* U.S. Dep't of Army, Training Circular No. 27-1, Your Conduct in Combat Under the Law of War.

Most soldiers would say that these lessons are obvious, and they are. Yet disciplined attention to detail in these basic areas will almost guarantee that a commander will have no problems on the battlefield.

2. The New "Humanitarian" Law of Armed Conflict.

International developments in the law of war in the 1970's have concentrated on the articulation of what have previously been judgmental guidelines. The "restatement," it was felt, would give uniform guidance and would put teeth into the exercise of military value judgments. In effect, international lawyers have attempted to draft guidance for later domestic criminal law implementation of the long-practiced soldierly concepts of necessity and of proportionality. The heart of these combat offenses is found in Article 85 of the Protocol. An examination of its terms imparts the flavor of this proposed requirement.

> [T]he following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
>
> a. making the civilian population or individual civilians the object of attack;
>
> b. launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . . ;
>
> c. launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . . ;
>
> d. making non-defended localities and demilitarized zones the object of attack;
>
> e. making a person the object of attack in the knowledge that he is *hors de combat*;
>
> f. the perfidious use . . . of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.[60]

No professional soldier would be surprised by the concepts articulated in this Article, for such admonitions have long been a part of his thinking and planning. It is the lawyerization, criminalization, and the politi-

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[60] DA Pam 27-1-1, Protocols, *supra* note 1, at 63-64.

calization of the most important value judgments he is called upon to make that is shocking. The Protocols require that legal advisers be available to advise commanders.[61] Presence of lawyers does two things. It helps to insure a knowledge of the law—indeed may even help impute it. It also silently suggests an infusion of methods used by the legal profession—"the legal paper system"—which meticulously and ponderously prepares either to avoid or to pursue litigation. In our military bureaucracy every judicial adverse action depriving a person of liberty or of property is recorded in some written fashion. Will monumental battlefield decisions require less? Would commanders now be expected to prepare "legal paperwork" every time they plan an attack? How else will they be able to demonstrate good faith and articulate, perhaps years later, the facts that were known to them? Will every politically motivated discussion of battlefield tactics be in criminal terms? Since grave breaches are regarded as war crimes,[62] the international politicalization of any allegation can be assured. Will fear of trial for the value-judgment-based concept of indiscriminate attack and excessive injury prolong conflict and even cause the use of more devastating means and methods of warfare by leaders who would otherwise be willing to go to the conference table? [63] Will codification of the concept of proportionality be used politically by the victor over the vanquished to punish former enemies? [64] Is this entire concept a ruse or a disguised first step toward the outlawing of certain types of weapons, currently nuclear weapons? [65]

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[61] *Id.* at 62. *See also* Norsworthy, *Organization for Battle: The Judge Advocate's Responsibility Under Article 82 of Protocol I to the Geneva Conventions*, 93 Mil. L. Rev. 9 (1981); Parks, *The Law of War Advisers*, 31 Judge Advoc. Gen. J. 1 (1980); Draper, *Role of Legal Advisors in Armed Forces*, 202 Int'l R. of Red Cross 6 (1978).

[62] DA Pam 27-1-1, Protocols, *supra* note 1, at 65.

[63] *See* Roling, *Criminal Responsibility for Violations of the Law of War*, in The New Humanitarian Law of Armed Conflict (Vol. 1) 209 (A. Cassese ed. 1979).

[64] *See* Roling, *Criminal Responsibility for Violations of the Law of War*, in The New Humanitarian Law of Armed Conflict (Vol. 2) 141 (A. Cassese ed. 1979).

[65] *Id.* at 143:

> The laws of humanitarian warfare also have a shadowy side. If we regulate war, we may contribute to a revival of the opinion that war is an honorable and reasonable affair, that it is even human and morally acceptable. As a matter of fact, we make and elaborate upon a lot of rules but, in the meantime, technology makes war uglier, more a matter of mass destruction, and more cruel. So there is a certain danger in elaborating humanitarian laws of war. But the positive value of elaborating the law of war prevails, primarily because it may contribute to the prohibition of *nuclear warfare*. . . . The prohibition of specific means and methods of warfare, and especially of the concept of 'disproportionality' and 'excessive suffering' which is inherent in nuclear warfare, is contributing to the slow development of the prohibitions of nuclear war. It was stated at the Diplomatic Conference that the discussion there dealt only with conventional warfare. But it would be silly to make rules forbidding 'excessive suffering' for small weapons only, and to accept 'excessive suffering' caused by big weapons. That would be such a schizophrenic attittude that, in the long run, if those rules are accepted, they will have an impact with respect to nuclear warfare, although they have not been intended to have that impact.

If our country subscribes to these Protocols, implementation becomes all important. Commanders are entitled to clear notice. The suggested approach of our government is shocking and, in my judgment, unacceptable. It is suggested that "the approach of incorporating by reference in a federal statute the violations specified in the grave breaches provision appears to be a better one at this time." [66] Such an approach is a legal "head in the sand" attitude. Is the burden of lack of domestic consensus and of ambiguity to be born by soldiers personally and by their cherished professional reputation? Such a result is unacceptable. Articulate notice must be drafted. A practical system for recording fresh value judgments must be devised. Anything less is a "cop out" which may well mean the end of serious attention to the law of war by practical soldiers.

IV. RECOMMENDATIONS

1. Let's once again place commanders in the driver's seat regarding the rules of their profession.

Lawyers should give back and commanders should accept the primary responsibility for the rules of engagement. The "law" of war should be deemphasized. The ethics of military professionalism should be stressed with particular emphasis given to professional conduct on the battlefield. Commanders need once again to develop, and to make a part of their practical routine, a sensitivity to the concepts which make them unique and special. The health of our civilization depends upon the professional application of these concepts. Professional soldiers need to talk about, formally teach, and absorb both by interest and by example discipline in its broadest context. Commanders should stress the conduct they expect on the battlefield. Subordinates should instinctively know what is expected of them. Commanders with extensive combat experience should freely discuss their experiences, for such discussions are the most effective means of teaching professional conduct on the battlefield.

2. Let's have lawyer's "do their duty" and articulately complete the coupling between international and domestic standards in the law of war.

Compartmented, inexact, obscure manuals and little-used regulations or directives are unacceptable substitutes for a comprehensive, knowingly available, articulate code or courts-martial manual. Idealistic concepts must be made unquestionably practical. Unrefined incorporation by reference is an abrogation of responsibility and places upon some future soldier the burden of ambiguity as he faces criminal procedures which will undoubtedly besmirch his Army, his cause, and his profession. Define

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[66] Protocol Analysis, *supra* note 33, at p. I-85-21.

the duty expected of commanders! Articulate the boundaries within which criminal penalties will be exacted! Allow the natural preventive law functions to evolve which come from a clearly articulated and accepted standard!

3. Let's have a productive dialogue between practical commanders and idealistic lawyers.

Our modern, dangerous world begs for an acceptable compromise between the need for security provided as a part of military necessity and the need for humanitarian kindness. The military professional must be even more of a political surgeon in removing political cancer from the body politic. Modern weaponry and technology make the lethality of modern warfare unimaginable. Ancient virtues of fitness, fidelity, and discipline must be supplemented with sensitivity and technical competence. The trained and restrained use of deadly force requires even more professionalism on the part of our armed forces. The sensitive attorney must offer practical advice in assisting the military professional to systematically express the rules and guidelines under which he is to operate. Lawyers must use their professional craft to help devise rules that will command the acceptance that respect for the law deserves. The resulting standards must clearly express complex ideas in such a manner that they will be helpful to soldiers of all ranks required to make instant value judgements. Commanders must shape the jurisprudence of their profession, while lawyers must listen so they may assist in making practical and useful the rules of the military profession.

4. Let's rethink our training regarding professional conduct on the battlefield.

Once in thirty years or so there comes a time to implement change. The probable implementation of the new Protocols has created that opportunity. The Uniform Code of Military Justice may require amendment, the Manual for Courts-Martial change, and new executive orders, directive, or regulations must be promulgated. Perhaps, at long last, there will be a tri-service manual on the law of war. What an opportunity to shift emphasis and stress practical professional conduct on the battlefield! What an opportunity to clearly articulate what is expected! What an opportunity to creatively change our training in the necessities of military professionalism!

Level of expertise and responsibility should be clearly addressed. Within a division the emphasis should be on professional conduct on the battlefield. The corps is the place for locating the newly proposed law of war adviser. This is the practical level for the review of war plans, for the direction of emphasis in rules of engagement and in standard operating procedures, and for the development of a system for recording

facts and value judgments to support a commander's determination of necessity and of proportionality. Department of the Army should be concerned with formulation of practical regulatory systems. For example, soldiers should never have to worry about the legality of the unaltered use of their weapons. The procedures for handling prisoner of war camps should be a matter of uniform regulation. The lawyer's language must become the soldier's common law when such regulatory systems are being written.

There should be different training for different levels of command. Sergeants do not need the technical expertise of generals. The higher the rank the more legally technical knowledge should be required. Basic Branch Courses, Career Courses, Command and General Staff College, War College, and General Officer "Charm School" make logical steps for teaching increasingly more technical material. Reducing everyone to the same common denominator is stultifying. The lack of interest and absence of instruction within the Army system is cause for great concern.[67] Again, it is not so much legal concepts that need to be taught but professional military common law. To witness the excitement on the faces of military students when they discover the depth, the richness, and the honorableness of their profession makes all the teaching preparation worthwhile. Such training is simply not being given to the officer corps. An underscoring of the historic professionalism of a military officer is the best insurance of professional conduct on the battlefield.

V. CONCLUSION

The drafting of new Protocols with the resulting debate concerning their adoption and possible appropriate domestic implementation provides a perfect opportunity to reexamine what the American people expect of their professional military. The quieting of the passions surrounding the Vietnam conflict allow a reasoned discussion of what has been learned in our experience in that difficult conflict. The failure of our government to clearly articulate domestic standard expected of soldiers has caused considerable misunderstanding, confusion, and embarrassment. That failure provides a dangerous vacuum in the vital area of a soldier's social contract with the citizenry he serves. Now is the time for soldiers to articulate the essential ingredients of their profession. With the help of sensitive lawyers, standards can be articulated that will allow *soldiers* to teach and to transmit more easily the basic jurisprudence of the military profession. This articulation will not only return to the soldier the central role in controlling his profession, but it will also further the goal of humanitarianism by helping to insure sensitive com-

[67] *See* Norsworthy, *supra* note 61, 22 n.24.

pliance with accepted soldierly rules of behavior. The more professional our armed forces the more likely that the goals of the humanitarians will be served.

EPILOGUE

This article has sought to harmonize the need for control of violence articulated by visionary internationally minded lawyers with the need for security demanded by practical military professionals. This conflict is not a new phenomenon. Its unusually clear and concise articulation in a recent article [66] is worth quoting. These quoted paragraphs began a plea for more "military" in military justice when the pressures of the battlefield were considered. A not dissimilar theme was presented in this study but in the context of internationally accepted rules of engagement. The pressing necessity for harmonizing the vital role of two professions in controlling the use of force on the battlefield is self-evident in our turbulent world dominated by almost unimaginable death producing technology.

> There is a natural conflict between law and armed force. Both are competitors for authority. Each seeks in the name of sovereign to control and possibly eliminate acts and conduct which the other values highly. Each has a limited tolerance or respect for the institutions and doctrine of the other. One is essentially a restriction upon the exercise of power while the other is essentially the effective use of power. One places great store in how a goal is achieved, while the other focuses primarily on the fact of mission accomplishment. One seeks elimination of violence while the other employs violence on a broad scale. One uses sovereign power to minimize disruption and instability, while the other uses sovereign power to create both conditions elsewhere, with the intent of bringing peace through the imposition of the sovereign's will upon an opponent.
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> But there are some similarities as well. Both deal with matters deemed to be vital to the state. Each is concerned, albeit from a different perspective, with functions which are hallmarks of national sovereignty and which every state is expected to provide for its citizens; stability, safety, and security. Thus both seek the preservation of the state and its society—but by quite contrary means and methods.
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> The competition between law and armed force is not new. It is probably as old as man, and certainly dates no later than the

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[66] *See* Prugh & Westmoreland, *supra* note 56.

recognition that law, not executive discretion alone, may limit force.[69]

APPENDIX A

The portion of the Prosecution Brief on the Law of Principals in *United States v. Captain Ernest L. Medina* detailing the duties of a combat commander is as follows:

A COMBAT COMPANY COMMANDER HAS CERTAIN UNIQUE DUTIES

A

A COMPANY COMMANDER IS RESPONSIBLE FOR CONTROLLING AND SUPERVISING HIS SUBORDINATES DURING COMBAT OPERATIONS

It has long been a custom of the service that, in general, a commander is responsible for the actions of his subordinates in the performance of their duties. This service custom was judicially underscored by Judge Latimer who stated in a concurring opinion, 'Military law recognizes no principal which is more firmly fixed than the rule that a military superior is responsible for the proper performance by his subordinates of their duties.' *United States v. Waluski*, 6 USCMA 724, 21 CMR 46, 55 (1956). For indeed, the responsibility of a commander for controlling and supervising his subordinates is the cornerstone of a responsible armed force. A commander must 'give clear, concise orders' and must 'be sure they are understood.' FM 22-100, *Military Leadership*, para. 59 (1 Nov 1965). 'After taking action or issuing an order,' a commander 'must remain alert and make timely adjustments as required by a changing situation.' FM 22-100, supra, para. 25.

A commander 'keeps informed on the situation at all times and goes where he can best influence the action.' FM 7-10, *The Rifle Company, Platoons, and Squads*, para. 1-6 (17 April 1970). 'Without undue harassment, he supervises his unit by checking on its progress in accomplishment of actions and orders.' FM 22-100, supra, para. 19. Stated succinctly, 'The successful commander insures mission accomplishment through personal presence, observation, and supervision.' FM 100-5, *Operations of Army Forces in the Field*, para. 3-7 (6 Sep 1968). The custom of the Armed Forces regarding command respon-

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[69] *Id.* at 1-2.

sibility is well stated in FM 22-100, supra, para. 22: 'The military commander has complete and overall responsibility for all activities within his unit. He alone is responsible for everything his unit does or does not do.' See also, FM 7-10, supra, para. 1-6. This command responsibility does not, of course, extend to criminal responsibility unless the commander knowingly participates in the criminal acts of his men or knowingly fails to intervene and prevent the criminal acts of his men when he had the ability to do so.

Military commanders may also be responsible for war crimes committed by their subordinates. 'When troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.' FM 27-10, *The Law of Land Warfare*, para. 501, pp. 178-179 (July 1956). See Army Subject Schedule No. 27-1, dated 20 April 1967, at p. 24.

In addition to controlling and supervising his subordinates, an Army officer, due to his superior rank and senior position, must conduct himself in an exemplary manner. *United States v. Fleming*, 7 USCMA 543, 23 CMR 7 (1957). In CM 374314, *Floyd*, 18 CMR 362, 366 (1955), (pet. den.) the Board of Review stated, '. . . As a commissioned officer of the United States Army, Colonel Keith, whether the senior American officer present in the particular camp or not, and although deprived of many of the functions and prerogatives of his office by his Communist captors, had the responsibility and duty to take such actions as were available to him (and if the senior officer present to exercise such command as he was able) to assist his fellow prisoners, to help maintain their morale, and to counsel, advise and, where necessary, order them to conduct themselves in keeping with the standards of conduct traditional to American servicemen.'

B

A COMPANY COMMANDER HAS CERTAIN RESPONSIBILITIES AS AN INDIVIDUAL, REGARDLESS OF HIS COMMAND POSITION

A combat commander has a duty, both as an individual and as a commander, to insure that humane treatment is accorded to noncombatants and surrendering combatants. Article 3 of the Geneva Convention relative to the Treatment of Prisoners of War specifically prohibits violence to life and person, particularly murder, mutilation, cruel treatment, and torture. Also prohibited are the taking of hostages, outrages against personal dignity and summary judgment and sentence. It demands that the wounded and sick be cared for. DA Pamphlet 27-1, December 1956, p. 68. These same provisions are found in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. DA Pam 27-1, supra, p. 136. While these requirements for humanitarian treatment are placed upon each individual involved with the protected persons, it is especially incumbent upon the commanding officer to insure that proper treatment is given.

Additionally, all military personnel, regardless of rank or position, have the responsibility of reporting any incident or act thought to be a war crime to his comamnding officer as soon as practicable after gaining such knowledge. MACV Directive 20-4, dated 27 April 1967, para. 5a. Commanders receiving such reports must also make such facts known to the Staff Judge Advocate, USMACV. MACV Directive 20-4, supra, para. 5b. It is quite clear that war crimes are not condoned and that every individual has the responsibility to refrain from, prevent and report such unwarranted conduct. While this individual responsibility is likewise placed upon the commander, he has the additional duty to insure that war crimes committed by his troops are promptly and adequately punished. FM 27-10, supra, para. 507, p. 182.

APPENDIX B

Judge Howard's summary of the evidence surrounding the crucial question of knowledge in *United States v. Captain Ernest L. Medina* is as follows:

A. For the Prosecution:

The following statements are prosecution representations and not my conclusions as to the state of the evidence but the prose-

cution alleges that Captain Medina was the company commander of Charlie Company, 1st Battalion, 20th Infantry of the 11th Brigade. As company commander Captain Medina had briefed the men of his company, assigned them specific missions, dispatched them on a combat assault described as a search-and-destroy mission, into the village of My Lai (4) at about 0730 hours on 6 March 1968. The prosecution alleges that the accused was on the ground in and about the village of My Lai (4) from shortly after 0730 hours, 16 March 1968, until after Charlie Company moved from the village of My Lai (4) into a night laager position in the afternoon of 16 March 1968, as well as thereafter. The prosecution also alleges that Captain Medina was in radio contact throughout the operation with his platoons. It is contended that the accused was aware almost from the beginning of the operation that the units of his company were receiving no hostile fire and in fact early in the morning ordered his men to conserve ammunition. The prosecution also contends that some time during the morning hours of 16 March 1968, the accused became aware that his men were improperly killing noncombatants. It is contended that this awareness arose because of the accused's observations, both by sight and hearing, and because of the conversation between Sergeant Minh and the accused. The prosecution contends this time of awareness on the part of the accused was at least at some time between 0930-1030 hours, 16 March 1968, if not earlier. The contention is further made that the accused, as Company Commander, had a continuing duty to control the activities of his subordinates where such activities were being carried out as part of an assigned military mission, and this became particularly true when he became aware that the military duties were being carried out by his men in an unlawful manner. The prosecution contends that Captain Medina, after becoming aware of the killing of noncombatants by his troops, declined to exercise his command responsibility by not taking necessary and reasonable steps to cause his troops to cease the killing of noncombatants. It is further contended by the prosecution that after the accused became aware of these acts of his subordinates and before he issued an order to cease fire, that a number of unidentified Vietnamese civilians were killed by his troops. The contention is made that Captain Medina did not issue a cease fire order until late in the morning and that when a cease fire order was in fact given, that the troops did cease their fire. It is the prosecution's contention that the accused was capable of controlling his troops throughout the opera-

tions, but that once learning he had lost control of his unit, he declined to regain control for a substantial period of time during which the deaths of unidentified Vietnamese civilians occurred. It is finally the prosecution's contention that as a commander the accused, after actual awareness, had a duty to interfere (and) he may be held personally responsible because his unlawful inaction was the proximate cause of unlawful homicides by his men.

B. For the Defense:

Contrary to the theory of the prosecution, the defense alleges that Captain Medina never became aware of the misconduct of his men until too late and immediately upon suspecting that his orders were being misunderstood and improper acts occurring, he ordered his men to cease fire. The accused contends that even though he was on the ground he stayed with his command post west of the village for tactical reasons and never saw any evidence of suspicious or unnecessary deaths until immediately prior to the cease fire order. He contends that he was aware of an artillery prep and double coverage of helicopter gunships, and that it was likely that some noncombatants might be killed by such protective fires. He believed that noncombatants, and particularly the women and children, would not be in the village on that particular morning. He contends that though he saw a few bodies near the vicinity of the village of My Lai (4), he believed these to be the results of the artillery and gunship fire. The accused contends that though be became aware that his troops were out of control, by the time of this awareness, the deaths had all occurred and it was too late to prevent what had occurred; but as soon as he became aware he did issue a cease fire order. He asserts that though there was some degree of volume of fire throughout the morning, he was aware that his men were under orders to kill the livestock in My Lai (4) and in the initial stages of the operation his men were advancing toward and through what he believed to be an area heavily infested with a well-armed enemy and his men were laying down a suppressive fire.

THE MILITARY DEATH PENALTY AND THE CONSTITUTION THERE IS LIFE AFTER *FURMAN**

By Captain Michael E. Pfau**
and Captain Eugene R. Milhizer***

I. INTRODUCTION

In the landmark decision of *Furman v. Georgia*,[1] the Supreme Court issued a sweeping *per curiam* order that "the imposition and carrying out of the death penalty in [the cases under review] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." [2] Although two-thirds of the states enacted new death penalty statutes within four years of that decision,[3] Congress has not amended the pertinent provisions of the Uniform Code of Military Justice (U.C.M.J.) [4] in the more than ten years which have passed since *Fur-*

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* The opinions and conclusions expressed in this article are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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[1] Furman v. Georgia, 408 U.S. 238 (1972).

[2] *Id.* at 239-40.

[3] Gregg v. Georgia, 428 U.S. 153, 179-80 (1976)

[4] Uniform Code of Military Justice arts. 1-140, 10 U.S.C. §§ 801-940 (1976) [hereinafter cited at U.C.M.J.].

man.[5] The United States Army Court of Military Review ended the uncertainty with respect to the constitutionality of the military death penalty [6] when it ruled that the imposition of the death penalty for premeditated murder does not violate the Eighth Amendment [7] prohibition against cruel and unusual punishment.[8] In this article, the authors conclude that the military capital sentencing system fully comports with the concerns enunciated in *Furman* and its progeny and that the imposition of the death penalty for premeditated murder does not violate the Eighth Amendment.[9]

II. PROCEDURAL AND SUBSTANTIVE REQUIREMENTS ESTABLISHED BY *FURMAN*

Prior to *Furman*, the few Supreme Court decisions construing the Eighth Amendment's cruel and unusual punishments clause interpreted that provision as a limitation upon the method of execution [10] or upon the proportionality of the sentence and the offense.[11] With *Furman*,

[5] Death is currently an authorized punishment under the following Articles of the U.C.M.J.: 85 (desertion in time of war); 90 (assaulting or willfully disobeying superior commissioned officer in time of war); 94 (attempted mutiny, mutiny, sedition, failure to suppress or report mutiny or sedition); 99 (misbehavior before the enemy); 100 (subordinate compelling surrender); 101 (improper use of a countersign); 106 (espionage in time of war); 113 misbehavior of sentinel in time of war); 118 (premeditated murder and felony murder); 120 (rape). The courts of military review for both the Army (United States v. Matthews, 13 M.J. 501, 515, 519 (A.C.M.R.) (en banc), *mandatory appeal docketed*, 13 M.J. 236 (C.M.A. 1982)) and the Air Force (United States v. McReynolds, 9 M.J. 881 (A.F.C.M.R. 1980)) have held that the provision in Article 120, U.C.M.J. which authorizes the death penalty for the offense of rape, has been effectively invalidated by the Supreme court's decision in Coker v. Georgia, 433 U.S. 584 (1977).

[6] During the preceding years, "[s]taff judge advocates advised convening authorities not to refer certain offenses as capital; commentators asserted that violations of the Uniform Code of Military Justice that are punishable by the death penalty 'now fail, and imposition of capital punishment pursuant to any of them is unconstitutional'; and a military court of review observed that *Furman* 'raises doubts as to the validity of imposing the death sentence under any circumstances.'" English, *The Constitutionality of the Court-Martial Death Sentence*, 21 A.F.L. Rev. 552 (1979) (footnotes omitted); *see also* Russelburg, *The UCMJ's Death Penalty: A Constitutional Assessment*, 13 The Advocate 74 (1981); Trogolo, *Capital Punishment Under the UCMJ After Furman*, 16 A.F.L. Rev. 86 (1974).

[7] U.S. Const. amend. VIII.

[8] United States v. Matthews, *supra* note 5.

[9] This article focuses upon the procedural protections in the military capital sentencing system and the constitutionality of the death sentence for premeditated murder. The question of whether this penalty may constitutionally be imposed for the other offenses for which it is authorized under the Uniform Code of Military Justice (*see note 5 supra*) is outside the scope of this article. Thus, the authors express no opinion as to "[w]hether the Supreme Court would uphold a mandatory death penalty in wartime, based upon military exigency or some other special justification." United States v. Matthews, 13 M.J. at 525 n.16; *see, e.g.*, U.C.M.J. art 106 (mandatory death penalty for wartime spying); *see generally* Roberts (Harry) V. Louisiana, 431 U.S. 633 (1972).

[10] *See* In re Kemmler, 136 U.S. 436, (1890); Wilkerson v. Utah, 99 U.S. 130 (1879).

[11] *See* Powell v. Texas, 392 U.S. 514 (1968); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910); O'Neil v. Vermont, 144 U.S. 323, 339–41, 370-71, (1892) (Field, J., and Harlan and Brewer, J.J., dissenting); *see also* Robinson v. California, 370 U.S. 660 (1962).

however, the Court initiated a new doctrinal concern for the procedures used in adjudging the death penalty.[12] Although the five members of the *Furman* majority did not join in a single rationale, three of the justices concluded that the Eighth Amendment prohibits imposition of the death penalty under statutes which confer unlimited discretion upon sentencing authorities in capital cases or under which the death penalty is rarely imposed.[13] In assessing the constitutionality of the capital sentencing systems which were enacted after *Furman*, the Supreme Court has focused upon the provisions for consideration of evidence in extenuation and mitigation, in aggravation, and for appellate review of death sentences. Each of these aspects of the military capital sentencing system satisfies the concerns enunciated in *Furman* and its progency.[14]

A. EXTENUATION AND MITIGATION

The Supreme Court has instructed that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [15] The Supreme Court has mandated that the sentencing body be free to assign "independent mitigating weight" [16] to matters offered by a capital accused. The Supreme Court has never demanded that state legislatures interfere with the traditional role of "the jury to dispense mercy on the basis of factors too intangible to write into a statute." [17]

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[12] *See generally* Radin, *Cruel and Unusual Punishment and Respect for Persons: Super Due process of Death*, 53 S. Cal. L. Rev. 1143 (1980); *see also* U.S. Const. Amend. XIV.

[13] *See* Furman v. Georgia, 408 U.S. at 257 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring). The two remaining members of the majority reasoned that capital punishment *per se* violates the Eighth Amendment. *Id.* at 257 (Brennan, J., concurring); *id.* at 358 (Marshall, J., concurring). This latter view was subsequently rejected by a majority of the Supreme Court in Gregg v. Georgia, *supra* note 3.

[14] In addition to decisions reviewing the procedural aspects of capital sentencing systems, the Supreme Court also has extended its proportionality analysis (*see* note 11 *supra*, and accompanying text) in two cases. First, as already noted, the Court ruled that the Eighth Amendment prohibits imposition of the death penalty for the offense of rape. *See* Coker v. Georgia, *supra* note 5. Additionally, the Court held that the death penalty could not be imposed upon a nontriggerman felony murderer who did not kill, attempt to kill, or intend to kill. *See* Enmund v. Florida, 102 S. Ct. 3368 (1982). These decisions only indirectly affect the Court's view of the procedural aspects of a capital sentencing system, and a full development of these two decsions is therefore beyond the scope of this article.

[15] Eddings v. Oklahoma, 102 S. Ct. 869, 872 (1982), *quoting* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (emphasis in original; footnote omitted); *accord* Enmund v. Florida, 102 S. Ct. at 3393 (O'Conner, J., dissenting); Bell v. Ohio, 438 U.S. 637, 642 (1978) (opinion of Burger, C.J.).

[16] Lockett v. Ohio, 438 U.S. at 605 (opinion of Burger, C.J.).

[17] Gregg v. Georgia, 428 U.S. at 222 (White, J., concurring).

The Eighth Amendment does not require that a capital sentencing statute either provide an illustrative list of matters in extenuation and mitigation or assign relative weight to such matters.[18] Certain capital sentencing statutes, which have been found to be constitutional by the Supreme Court, do provide an illustrative listing of extenuating and mitigating circumstances.[19] Conversely, other capital sentencing statutes, which specify no mitigating or extenuating circumstances, have likewise been approved by the Supreme Court.[20] Thus, while some statutory guidance regarding extenuating and mitigating circumstances will be constitutionally tolerated, *Furman* and its progeny require that a capital accused not be precluded from presenting any relevant matters in this regard.[21] As the "centrist plurality" [22] noted in their favorable review of the Georgia statute, "it is preferable not to impose restrictions [as to the presentation of evidence in extenuation and mitigation]. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." [23]

The military capital sentencing procedures fully satisfy the constitutional requirements for the presentation of matters in extenuation and mitigation. First, paragraph 75c of the Manual for Courts-Martial [24] authorizes an accused to place before the members any relevant mitigating circumstances to insure particularized consideration before death

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[18] Gregg v. Georgia, *supra* note 3; Bell v. Ohio, *supra* note 15; Lockett v. Ohio, *supra* note 15.

[19] Proffitt v. Florida, 428 U.S. 242, 257-58 (1976) (opinion of Stewart, Powell, and Stevens, J.J.) (statutory guidance provided by Fla. Stat. Ann. § 775.082(4) (Supp.1976-1977) found to be constitutionally permissible).

[20] Jurek v. Texas, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, J.J.) (the defendant is authorized "to bring before the jury at a separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced"); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 333 (1976) (opinion of Stewart, Powell, and Stevens, J.J.); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (opinion of Stewart, Powell, and Stevens, J.J. (failure of mandatory death penalty statutes to provide for individualized consideration of the offender and the circumstances of the offense renders such statutes unconstitutional); Gregg v. Georgia, 428 U.S. 197, 206 (opinion of Stewart, Powell, and Stevens, J.J.) (jury is permitted to consider any mitigating circumstances).

[21] Lockett v. Ohio, 438 U.S. at 604 n.12 (opinion of Burger, C.J. *accord* Eddings v. Oklahoma, *supra* note 15; *see* Jurek v. Texas, 428 U.S. at 276 (opinion of Stewart, Powell, and Stevens, J.J.).

[22] Justices Stewart, Powell, and Stevens have been referred to as the "centrist plurality" of the Supreme Court in capital cases, for their opinions typically fall between the opposing positions espoused by Justices Brennan and Marshall, on the one hand (the imposition of capital punishment is unconstitutional *per se* (*see supra* note 13)), and Justice Rhenquist, on the other (the imposition of capital punishment requires few, if any, additional safeguards to satisfy the Constitution (*see* Furman v. Georgia, 408 U.S. at 465-70 (Rhenquist, J., dissenting)).

[23] Gregg v. Georgia, 428 U.S. at 204 (opinion of Stewart, Powell. and Stevens, J.J.).

[24] Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as Manual].

can be imposed.[25] Second, the military judge must instruct the members to consider that evidence in their deliberations on sentencing.[26] Finally, the court members are permitted to assign "independent mitigating weight" to all such matters presented by the defense.[27] Because the court members are free to assign independent weight to evidence introduced by the accused, the spirit and the letter of the Supreme Court's guidance in this regard are fully satisfied. The Supreme Court requires that the defense be free to present any relevant aspect of a defendant's character or record and any relevant circumstances of the offense in extenuation and mitigation in a capital case. The military capital sentencing procedures repose this flexibility in a military accused who is facing a sentence to death.

B. AGGRAVATION

A plurality of the Supreme Court has candidly recognized that "[t]here is no perfect procedure for deciding in which cases Government authority should be used to impose death." [28] Perhaps the range of constitutionally acceptable divergence is most apparent in the Supreme Court's decisions regarding the statutory treatment of aggravating circumstances. Various states have codified a spectrum of statutory aggravating factors which may validly serve as a basis for the death sentence. These states have also enacted contrasting procedures for the application of aggravating factors to a specific capital defendant. In analyzing the Supreme Court decisions which have interpreted these statutes, the authors find it clear that the military capital sentencing procedures regarding aggravation are constitutional with respect to both the procedural aspect of "guidance" and the substantive aspect of "narrowing."

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[25] *See also* Rule 1101(c), Military Rules of Evidence [hereinafter cited as M.R.E.]. The prosecution, on the other hand, may present only limited biographical and related information regarding the accused's age, pay, length of service, and duration of pretrial restraint (paragraph 75*b*(1), Manual) and additional evidence regarding the aggravating circumstances of the offense which was not introduced prior to findings. United States v. Vickers, 13 M.J. 403 (C.M.A. 1982). The prosecution also may introduce other convictions of an accused within the preceding six years (paragraph 75*b*(2), Manual), as well as personnel records which reflect the accused's past conduct and performance. Paragraph 75*d*, Manual. Thus, "[t]he evidence the Government can submit is quite limited in comparison to that which is admissible in federal civilian courts." English, *supra* note 6, at 560-562. *Compare* paragraph 75, Manual, *with* Fed. R. Crim. P. 32.

[26] United States v. Davidson, 14 M.J. 81 (C.M.A. 1982) (opinion of Fletcher, J.); United States v. Wheeler, 17 C.M.A. 274, 38 C.M.R. 72 (1967); United States v. Matthews, *supra* note 5; paragraph 76*b*, Manual; *see* U.S. Dep't of Army, Pamphlet No. 27-9, Military Judges' Benchbook para. 27-37 (1 May 1982) [hereinafter cited as Benchbook]; U.S. Dep't of Army, Pamphlet No. 27-9, Military Judges' Guide ch. 8 (19 May 1969, as changed through C.3, 1 June 1971) [hereinafter cited as Guide].

[27] *See supra* note 26.

[28] Lockett v. Ohio, 438 U.S. at 605 (opinion of Burger C.J.).

A recurring theme found throughout the post-*Furman* decisions of the Supreme Court is that the statutory aggravating circumstances of a capital murder must be procedurally applied at trial in a manner which focuses and guides sentencing discretion.[29] The Supreme Court has never interpreted the Eighth or Fourteenth Amendments, however, to require that the statutory aggravating circumstances of a capital murder be introduced or found at any particular stage of a capital trial.[30] Of the trilogy of Eighth Amendment cases which first won Supreme Court approval after *Furman*, two decisions, *Gregg v. Georgia*,[31] and *Proffitt v. Florida*,[32] addressed state statutes which provide a listing of aggravating circumstances to be applied, as appropriate, during the sentencing stage of a capital trial. The Texas statute, which was upheld as constitutional in *Jurek v. Texas*,[33] requires instead that the aggravating nature of a capital defendant's murder be proven during the findings stage of trial. As the "centrist plurality" stated:

> While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of a death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which death sentences may ever by imposed serves much the same purpose.[34]

Article 118, U.C.M.J. likewise narrows the categories of murders for which death sentences may be imposed:

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
> (1) has a premeditated design to kill;
> (2) intends to kill or inflict great bodily harm;
> (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
> is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

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[29] *See generally* Jurek v. Texas, 428 U.S. at 268-71, 274 (opinion of Stewart, Powell, and Stevens, J.J.); Proffitt v. Florida, 428 U.S. at 251-53 (opinion of Stewart, Powell, and Stevens, J.J.); Gregg v. Georgia, 428 U.S. at 191-95, 197-98 (opinion of Stewart, Powell, and Stevens, J.J.).

[30] *Compare* Jurek v. Texas, *supra* note 20, *with* Gregg v. Georgia, *supra* note 3.

[31] Gregg v. Georgia, *supra* note 3.

[32] Proffitt v. Florida, *supra* note 19.

[33] Jurek v. Texas, *supra* note 20.

[34] *Id.* at 270 (opinion of Stewart, Powell, and Stevens, J.J.).

A military accused may be sentenced to death only if two-thirds of the court members find him guilty beyond a reasonable doubt of an offense listed in either subsection (1) or (4) above, and if the members then unanimously determine that the accused should be sentenced to death.[35] This procedure, like that contained in the Texas statute, "requires the sentencing authority to focus on the particularized nature of the crime." [36] As the Army Court of Military Review has observed, "[t]hese procedural safeguards are virtually identical to the Texas procedure" which passed constitutional muster in *Jurek*.[37]

A second recurring theme found throughout the post-*Furman* decisions of the Supreme Court is that the statutory aggravating circumstances of a capital murder must serve to narrow, in a principled fashion, the class of murderers who are subject to the death penalty.[38] The Supreme Court has permitted the statutory aggravating circumstance to be provided either by narrow legislative definitions of capital offenses or by narrow judicial application of otherwise broad statutory definitions. In either case, the aggravating circumstance must circumscribe the broad category of all murders in a principled manner which distinguishes those murders which are death-deserving from those which are not.

As noted, the Supreme Court has not required that this narrowing be achieved by a definitive listing of aggravating circumstances in a capital sentencing statute.[39] Although there is some similarity between the statutory aggravating factors utilized in different jurisdictions, the capital sentencing statutes approved by the Supreme Court have included aggravating factors which contemplate a great variety of murders.[40] Where a jurisdiction intends to rely solely upon the aggravating circumstances as set out in the statute, however, the Supreme Court has emphasized that "[p]art of a State's responsibility is to *define* the crimes for which death may be the sentence in a way that obviates 'standardless discretion.' " [41]

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[35] U.C.M.J. arts. 51(c) and 52(b)(1).

[36] Jurek v. Texas, 428 U.S. at 271 (opinion of Stewart, Powell, and Stevens, J.J.).

[37] United States v. Matthews, 13 M.J. at 530.

[38] *See generally* Jurek v. Texas, 428 U.S. at 268, 276 (opinion of Stewart, Powell, and Stevens, J.J.); Proffitt v. Florida, 428 U.S. at 251-53 (opinion of Stewart, Powell, and Stevens, J.J.); Gregg v. Georgia, 428 U.S. at 197-98 (opinion of Stewart, Powell, and Stevens, J.J.).

[39] *See* Gregg v. Georgia, 428 U.S. at 195 (opinion of Stewart, Powell, and Stevens, J.J.).

[40] *See, e.g.*, Fla. Stat. Ann. § 921.141(5) (Supp. 1976-1977) (eight statutory aggravating factors); Ga. Code Ann. § 27-2534.1 (Supp. 1975) (ten statutory aggravating factors); Tex. Penal Code § 19.03 (1974) (five categories of capital murder); *see also* Gregg v. Georgia, 428 U.S. at 179 n.23 (opinion of Stewart, Powell, and Stevens, J.J. (listing of 35 separate post-*Furman* capital sentencing statutes).

[41] Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (opinion of Stewart, J.), *quoting* Gregg v. Georgia, 428 U.S. at 196 n.47 (opinion of Stewart, Powell, and Stevens, J.J.) (emphasis supplied).

The Eighth Amendment concern with "narrowing" does not focus exclusively upon the aggravating circumstances of a capital murder as defined by the statute. The Supreme Court instead has consistently examined the statutory aggravating circumstances of a capital murder as construed by the state appellate courts.[42] Where facially broad statutory aggravating factors have been interpreted in a sufficiently narrow manner, capital convictions have been upheld.[43] Where facially broad statutory aggravating factors have been interpreted with insufficient narrowing, capital convictions have been overturned.[44] Analogously, where facially restrictive and inflexible statutory criteria have been interpreted in a sufficiently broad manner, capital convictions have been upheld.[45]

Although the phrase "great risk of death to more than one person," [46] a statutory aggravating circumstance found in the Georgia statute, "might be susceptible of an overly broad interpretation," [47] the Supreme Court has upheld this provision against the constitutional attack that it inadequately narrowed the class of capital murders where the Georgia appellate courts had interpreted the provision in a sufficiently constricted manner.[48] The narrow interpretation of a similar statutory provision by the Florida appellate courts was likewise viewed by the Su-

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[42] *See, e.g.*, Godfrey v. Georgia, *supra* note 41; Proffitt v. Florida, 428 U.S. at 255-56 (opinion of Stewart, Powell, and Stevens, J.J.); Gregg v. Georgia, 428 U.S. at 200-03 (opinion of Stewart, Powell, and Stevens, J.J.).

[43] *See* Proffitt v. Florida, *supra* note 19; Gregg v. Georgia, *supra* note 3.

[44] *See* Godfrey v. Georgia, *supra* note 41.

[45] *See* Jurek v. Texas, *supra* note 20. The sentencing authority must be permitted to consider all relevant mitigating evidence. *See* notes 14-26, *supra*, and accompanying text. As noted in *Jurek*, "[t]he Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions." 428 U.S. at 272 (opinion of Stewart, Powell, and Stevens, J.J.). Although the Texas statute on its face thus failed to satisfy the Eighth Amendment, a plurality of the Supreme Court nonetheless observed that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Id.* Because the Texas appellate courts have interpreted Tex. Code Crim. Proc., 37.071-(b)(2) (Supp. 1975-1976)—"whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"—so as to "allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show" (Jurek v. Texas, 428 U.S. at 272 (opinion of Stewart, Powell, and Stevens, J.J.), *referring to* Jurek v. State, 522 S.W. 2d 934, 939-40 (Tex. 1975); *and* Smith v. State, No. 49,809 (Feb. 18, 1976)), the Supreme Court found that the Texas statute, as applied, satisfied the Constitution.

[46] Ga. Code Ann. § 27-2534.1(b)(3) (Supp. 1975).

[47] Gregg v. Georgia, 428 U.S. at 202 (opinion of Stewart, Powell, and Stevens, J.J.).

[48] *Id. Compare* Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1973) (capital conviction upheld on the basis of this aggravating circumstance where the defendant stood up in a church and fired a gun indiscriminately into the audience), *with* Jarrell v. State, 234 Ga. 410, 424, 216 S.E.2d 258, 269 (1975) (capital conviction reversed on the basis of this aggravating circumstance where the defendant simply kidnapped the victim in a parking lot).

preme Court as being of crucial significance to its decision that the Florida statute was constitutional as applied.[49]

Both the Florida and Georgia capital sentencing statutes provide that a murder is death-deserving if it was "perpetrated by one who manifest[s] exceptional depravity" [50] or exhibits "depravity of mind." [51] The Florida Supreme Court interpreted this factor as reaching only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." [52] The "centrist plurality" of the United States Supreme Court held that such an interpretation, when faithfully applied by the state appellate courts, satisfies the constitutional requirements for narrowing.[53]

The United States Supreme Court addressed the constitutionality of a Georgia statutory aggravating factor (whether the murder was "outrageously or wantonly vile, horrible, and inhuman"),[54] as applied to a case concerning multiple shotgun murders. Four justices found that an overly broad interpretation of the statutory aggravating circumstance was provided to the jury and that this unconstitutionally broad interpretation was "in no way cured" by the state supreme court's unprincipled affirmance of that case on appeal.[55] Contrary to the history of narrow state appellate interpretation of the statutory aggravating circumstance at issue in this case, three justices found that the appellate application the statutory aggravating factor constituted no more than the establishment of a conclusory "catch-all" device and thus created a substantial risk of arbitrary or capricious sentencing.[56] The coupling of a potentially broad statutory aggravating circumstance *and* an unprincipled appellate application of that statutory aggravating circumstance resulted in insufficient narrowing to permit the affirmance of the adjudged sentence to death.[57]

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[49] Proffitt v. Florida, 428 U.S. at 255 (opinion of Stewart, Powell, and Stevens, J.J.) (referring to State v. Dixon, 283 So.2d 1 (Fla. 1973), the Court concluded that the Florida Supreme Court interprets this and other statutory aggravating circumstances in a constitutionally narrow manner).

[50] *See* Fla. Stat. Ann. § 921.141(3)(h) (Supp. 1976-1977).

[51] *See* Ga. Code Ann. § 27-2534.1(b)(7) (Supp. 1975).

[52] State v. Dixon, 283 So. 2d at 9.

[53] Proffitt v. Florida, 428 U.S. at 255 (opinion of Stewart, Powell, and Stevens, J.J.).

[54] Ga. Code Ann. § 27-2534.1(b)(7) (Supp. 1975).

[55] Godfrey v. Georgia, 446 U.S. at 428-29 (opinion of Stewart, J.). Justices Brennan and Marshall agreed with the plurality as well as adhering to their view that capital punishment was unconstitutional *per se*. *Id.* at 433-42. Chief Justice Burger (*id.* at 442-44), and Justices Rehnquist and White (*id.* at 444-57), found the Georgia Supreme Court's application of the statute to be constitutional.

[56] *Id.* at 428-33 (opinion of Stewart, J.).

[57] The Army Court of Military Review likewise recognized the importance of appellate "narrowing" in its opinion in United States v. Matthews, *supra* note 5, when it stated:

> Finally, the Supreme Court has held that state courts may define or redefine statutory criteria which are facially too vague or indefinite. Considering the

In requiring either that a statute narrowly define capital crimes [58] or that the courts narrowly apply otherwise broad statutory definitions of capital crimes,[59] the Supreme Court has established that the statutory aggravating circumstance must narrow the broad category of all murders in a principled manner which distinguishes those murders which are death-deserving from those murders which are not. Quite obviously, the Constitution would not permit statutory or appellate narrowing of capital offenses for impermissible reasons.[60] Just as obviously, an unprincipled and arbitrary statutory or appellate narrowing of capital offenses would do little to reflect "the evolving standards of decency that mark the progress of a maturing society." [61] Rather, the Eighth and Fourteenth Amendments require narrowing the class of capital offenses to those crimes which are death-deserving and excluding those crimes for which death would be a cruel and unusual punishment. In this way, sentencing discretion can be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." [62]

This substantive concept of principled narrowing, as compared to the procedural aspects of its application, is firmly rooted in traditional Eighth Amendment analysis. By limiting in a principled fashion the class of offenders who face death, legislatures and courts can minimize the risk that capital punishment will be imposed upon an individual in such a way as to offend " 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' " [63] By filtering out those offenders

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Georgia statute, which permits a death sentence upon a finding that the offense was "outrageously or wantonly vile, horrible and inhuman," the Court found that this criterion, as interpreted by the Georgia Supreme Court, was sufficiently precise to preclude arbitrary death sentences. *Gregg v. Georgia, supra.* However, four years later the Supreme Court struck down the Georgia Supreme Court's application of the same standard as too broad, but did not invalidate the Georgia statutory procedure itself. *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980). The Supreme Court took a similar approach with regard to the vagueness of the aggravating and mitigating factors in the Florida statutes, relying on the Florida Supreme court to apply them rationally and consistently. *Proffitt v. Florida, supra*, 428 U.S. at 255-56, 96 S. Ct. at 2968. On the other hand, the Supreme Court has construed the facially restrictive sentencing criteria of Texas in a manner broad enough to comport with constitutional requirements. *Jurek v. Texas, supra,* 428 U.S. at 272-73, 96 S. Ct. at 2956-57.

United States v. Matthews, 13 M.J. at 529 (footnote omitted).

[58] *See* Godfrey v. Georgia, 446 U.S. at 428 (opinion of Stewart, J.), *citing* Gregg v. Georgia, 428 U.S. at 196 n.47 (opinion of Stewart, Powell, and Stevens, J.J.).

[59] *See, e.g.,* Godfrey v. Georgia, *supra* note 41.

[60] *Cf.* Furman v. Georgia, 408 U.S. at 240-58 (Douglas, J., concurring) (the death penalty's narrow application to a politically unpopular minority would violate the Constitution).

[61] Trop v. Dulles, 356 U.S. at 101 (opinion of Warren, C.J.).

[62] Gregg v. Georgia, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, J.J.).

[63] Gregg v. Georgia, 428 U.S. at 173 (opinion of Stewart, Powell, and Stevens, J.J.), *quoting* Trop v. Dulles, 356 U.S. at 100 (opinion of Warren, C.J.); *see* Furman v. Georgia, 408 U.S. at 270 (Brennan, J., concurring).

for whom a capital sentence would be inappropriate, the risk is minimized that the "imposition [of death] would . . . be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." [64] In short, the death penalty may be imposed only upon a class of offenses which are narrowly defined by principled criteria. "[T]he sanction [of death] . . . cannot be [imposed in a manner which is] so totally without penological justification that it results in the gratuitous infliction of suffering." [65]

The Supreme Court has consistently recognized that the "death penalty . . . serve[s] two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." [66] "Unless the death penalty . . . [as] applied . . . measurably contributes to one or both of these goals," [67] its application is unconstitutionally broad and thus contrary to the Eighth Amendment. Where one or both of these goals are measurably served by the death penalty as applied, its infliction has therefore been sufficiently narrowed upon a principled basis and consequently survives constitutional scrutiny.[68]

The retributive aspect of capital punishment has long been recognized. Capital punishment is, in part, "an expression of society's moral outrage at particularly offensive conduct." [69] Although "[r]etribution is no longer the dominant objective of criminal law," [70] it is not impermissible for so-

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[64] Furman v. Georgia, 408 U.S. at 312 (White, J., concurring); *accord* Coker v. Georgia, 433 U.S. at 592.

[65] Gregg v. Georgia, 428 U.S. at 153 (opinion of Stewart, Powell, and Stevens, J.J.), *citing* Wilkerson v. Utah, 99 U.S. at 135-36, *and* In re Kemmler, 136 U.S. at 447.

[66] Gregg v. Georgia, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, J.J.; *accord* Enmund v. Florida, 102 S. Ct. at 3377; *see* Coker v. Georgia, *supra* note 5. A permissible additional purpose served by capital punishment is "the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future." Gregg v. Georgia, 428 U.S. at 183 n.28 (opinion of Stewart, Powell, and Stevens, J.J.); *see* Coker v. Georgia, 433 U.S. at 609-10 (Burger, C.J., dissenting); Roberts (Stanislaus) v. Louisiana, 428 U.S. at 354 (White, J., dissenting). Obviously, the death penalty cannot serve the penological purpose of rehabilitation. *See* Furman v. Georgia, 408 U.S. at 306 (Stewart, J., concurring). That rehabilitation is a permissible goal of penology, and thus must be considered before death can be imposed, is reflected by the Supreme Court's insistence that a capital defendant not be precluded from presenting any relevant evidence in extenuation and mitigation. *See generally* Eddings v. Oklahoma, *supra* note 15; Lockett v. Ohio, *supra* note 15.

[67] Enmund v. Florida, 102 S. Ct. at 3377.

[68] *Compare* Proffitt v. Florida, *supra* note 19, *and* Gregg v. Georgia, *supra* note 3, *with* Enmund v. Florida, *supra* note 14, *and* Godfrey v. Georgia, *supra* note 3. Arguably, the death penalty would "measurably" serve both retribution and deterrence for any offense. The appropriate question, however, is whether capital punishment measurably serves these goals in relation to a lesser penal sanction. *See* Gregg v. Georgia, 428 U.S. at 175 (opinion of Stewart, Powell, and Stevens, J.J.); *see also* Furman v. Georgia, 408 U.S. at 346-48 (Marshall, J., concurring).

[69] Gregg v. Georgia, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, J.J.).

[70] Williams v. New York, 337 U.S. 241, 248 (1949).

ciety to "ensur[e] that the criminal gets his just deserts." [71] Retribution is thus not "a forbidden objective nor one inconsistent with our respect for the dignity of man." [72] Rather, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." [73] Accordingly, as long as capital punishment is reserved for a narrow class of offenses toward which society feels particular outrage and therefore is measurably serving retribution, the substantive component embodied in aggravating criteria will be constitutionally applied upon a principled basis.[74]

Unlike retribution, the deterrent effect of capital punishment has been a subject of great debate.[75] The Supreme Court has observed that the "value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with flexibility of approach which is not available to the courts." [76] As the Supreme Court has stated, the post-*Furman* applications of statutory aggravating circumstances reflect in part "a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent." [77] Accordingly, as long as capital punishment is reserved for a narrow class of offenses which may be prevented by imposition of the death penalty and therefore is measurably serving deterrence, the substantive component embodied in aggravating criteria will be constitutionally applied upon a principled basis.[78]

The statutory aggravating circumstance for murder in Article 118(1) of the U.C.M.J.—premeditation—is sufficiently narrow upon a principled basis to measurably serve the substantive social purposes of retribution and deterrence and, therefore, constitutional on its face. Assuming, *arguendo*, that this statutory category of capital murder is overly broad as drafted, "premeditation" may be more narrowly applied in a

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[71] Enmund v. Florida, 102 S. Ct. at 3378.

[72] Gregg v. Georgia, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, J.J.).

[73] Gregg v. Georgia, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, J.J.).

[74] *Compare* Gregg v. Georgia, *supra* note 3, *with* Enmund v. Florida, *supra* note 14, *and* Coker v. Georgia, *supra* note 5.

[75] *See generally* Gregg v. Georgia, 428 U.S. at 184–86 (opinion of Stewart, Powell, and Stevens, J.J.).

[76] Gregg v. Georgia, 428 U.S. at 186 (opinion of Stewart, Powell, and Stevens, J.J.), *citing* Furman v. Georgia, 408 U.S. at 403-05 (Burger, C.J., dissenting).

[77] Gregg v. Georgia, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, J.J.).

[78] *Compare* Gregg v. Georgia, *supra* note 3, *with* Enmund v. Florida, *supra* note 14, and Coker v. Georgia, *supra* note 5.

principled manner by military appellate courts to satisfy these same constitutional concerns.

The Supreme Court has indicated that a class of "carefully contemplated murders, such as murders for hire," [79] represents sufficient statutory narrowing to satisfy *Furman*. Other "calculated murders, . . . includ[ing] the use of bombs or other means of indiscriminate killings, [80] the extortion murder of hostages or kidnap victims, and the execution-style killing of a witness to a crime" [81] may also serve as an adequate statutory basis for principled narrowing. On the other hand, the Supreme Court has assumed "that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect." [82] Likewise, the Court has been "quite unconvinced . . . that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken"; [83] and, the Court has also concluded that the death penalty for such murders "does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." [84]

Somewhere between these degrees of calculation—carefully contemplated murders for hire versus murders in the heat of passion—lies the concept of "premeditation," the statutory aggravating circumstance contained in Article 118(1), U.C.M.J. Whether "premeditation" provides sufficient principled narrowing to satisfy constitutional requirements is a question which has yet to be addressed by the Supreme Court.[85] The criterion of "premeditation" measurably contributes to the social purposes of retribution and deterrence so as to provide sufficient, principled narrowing consistent with the requirements of *Furman* and its progeny.

The historical development of capital punishment as a sanction for murder strongly suggests that the criterion of "premeditation" repre-

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[79] Gregg v. Georgia, 428 U.S. at 186 (opinion of Stewart, Powell, and Stevens, J.J.).

[80] Article 118(3), U.C.M.J. which proscribes those murders which involve "an act which is inherently dangerous to others and evinces a wanton disregard for human life," does not provide capital punishment as a sentencing option. Accordingly, at least with regard to this category of murders, the military capital sentencing statute is arguably more narrow than both the Georgia statute (Ga. Code Ann. § 27-2534.1(b)(3) (Supp. 1975) (capital punishment authorized for one who, by his act of murder, armed robbery, or kidnapping, "knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person")) and the Florida statute. Fla. Stat. Ann. § 921.141(3)(d) (Supp. 1976-1977) (capital punishment authorized for one who "knowingly created a great risk of death to many persons").

[81] Gregg v. Georgia, 428 U.S. at 186 n.53 (opinion of Stewart, Powell, and Stevens, J.J.).

[82] *Id.*, at 185 (opinion of Stewart, Powell, and Stevens, J.J.).

[83] Enmund v. Florida, 102 S. Ct. at 3378.

[84] *Id.*

[85] *See* Schick v. Reed, 419 U.S. 256 (1974).

sents sufficient narrowing upon a principled basis to serve as a constitutionally permissible aggravating factor for the imposition of death. "The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England." [86] At common law, capital sentences were mandatorily imposed upon all convicted murderers.[87] Although the mandatory death penalty continued to be used into the 20th century by most American states, the breadth of the common law rule was diminished by the statutory narrowing of the class of murderers who could receive a capital sentence. Capital punishment was an available sentencing option only for murder in the first degree; *i.e.*, murders which were willful, deliberate, and premeditated.[88] More recently, some courts and commentators have advocated that the concept of premeditation be even further constricted in order to "limit the reach of the death penalty sanction." [89] If the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," [90] then the utilization of "premeditation" as the factor which distinguishes non-mandatory capital murders from less serious murders which are not death deserving is more than merely consistent with traditional Eighth Amendment standards. Indeed, "premeditation is the quintessential aggravating criterion for distinguishing death-deserving murders from all other forms of homicide." [91]

Furman and its progeny do not signal a departure from this standard. In fact, none of the Supreme Court's post-*Furman* opinions has expressly

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[86] Gregg v. Georgia, 428 U.S. at 176 (opinion of Stewart, Powell, and Stevens, J.J.); *see* McGautha v. California, 402 U.S. 183, 203 (1971).

[87] Gregg v. Georgia, 428 U.S. at 176-77 (opinion of Stewart, Powell, and Stevens, J.J.); McGautha v. California, 402 U.S. at 197-98; Andres v. United States, 333 U.S. 740, 753 (1948) (Frankfurter, J., concurring).

[88] Gregg v. Georgia, 428 U.S. at 177 (opinion of Stewart, Powell, and Stevens, J.J.); McGautha v. California, 402 U.S. at 198-99; Andres v. United States, 333 U.S. at 757 (Frankfurter, J., concurring).

[89] McGautha v. California, 402 U.S. at 198-99; Austin v. United States, 382 F.2d 129, 133-36 (D.C. Cir. 1967). The breadth of the common law rule was further diminished by the widespread adoption of laws expressly granting juries the discretion to recommend mercy. Gregg v. Georgia, 428 U.S. at 177 (opinion of Stewart, Powell, and Stevens, J.J.); McGautha v. California, 402 U.S. at 199-200; Andres v. United States, 333 U.S. at 737 (Frankfurter, J., concurring); *see* Woodson v. North Carolina, 428 U.S. at 289-92 (opinion of Stewart, Powell, and Stevens, J.J.). The Supreme Court has more recently interpreted the Constitution as requiring that capital sentencing procedures not inhibit the jury from dispensing mercy at its discretion, both in the rejection of broad mandatory death penalty statutes (Woodson v. North Carolina, *supra* note 20; Roberts (Stanislaus) v. Louisiana, *supra* note 20, and in the requirement that the defense be afforded an opportunity to present a virtually unlimited range of evidence in extenuation and mitigation. *See* Eddings v. Oklahoma, *supra* note 15; Lockett v. Ohio, *supra* note 15; *see also* W. LaFave & A. Scott, Handbook of Criminal Law 563 n.11 (1972).

[90] Trop v. Dulles, 356 U.S. at 101 (opinion of Warren, C.J.).

[91] *See* McGautha v. California, *supra* note 86. *But cf.* Model Penal Code § 201.6, comment at 70 (Tent. Draft No. 9, 1959) (some impulse murders may be more death-deserving than some premeditated murders).

addressed the adequacy of "premeditation" as a statutory aggravating factor for murder. In *Jurek v. Texas*, *Proffitt v. Florida*, and *Gregg v. Georgia*,[92] the Supreme Court reaffirmed the constitutionality of punishing some murderers by death. In *Woodson v. North Carolina*, and *Roberts (Stanislaus) v. Louisiana*,[93] the Supreme Court reasserted the constitutional disfavor of mandatorily punishing broad classes of murderers by death. In *Enmund v. Florida*,[94] the Supreme Court held that death was an unconstitutional punishment for a class of killers which included unintentional murderers. In *Godfrey v. Georgia*,[95] the Supreme Court held that a facially broad and vague category of murder must be applied in a principled manner to support a capital sentence imposed thereunder. Thus, the Supreme Court has left open the question of whether the Constitution permits non-mandatory capital sentencing for murder on the basis of premeditation.

Likewise, the Supreme Court has yet to review a statute which includes premeditation *per se* as a statutory aggravating factor for murder. Of the trilogy of cases which directly followed *Furman*, none involved state statutes which narrowed the class of murderers on the basis of premeditation alone. *Gregg* involved a statutory class of murderers which included all deliberate, intentional killings and felony murder,[96] further narrowed by statutory aggravating circumstances not including premeditation.[97] *Proffitt* concerned a statutory classification of murder which included premeditated murder, felony murder, and death by the unlawful distribution of heroin,[98] further narrowed by statutory aggravating factors not including premeditation.[99] *Jurek*, the case which interprets a state statute most closely resembling Article 118, U.C.M.J., addressed a statutory classification of murder which included intentional killings, killing as a result of clearly dangerous acts, and felony murder,[100] further narrowed by other statutory criteria not including premeditation.[101] None of the statutes later reviewed by the Supreme

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[92] Jurek v. Texas, *supra* note 20; Proffitt v. Florida, *supra* note 19; Gregg v. Georgia, *supra* note 3.

[93] Woodson v. North Carolina, *supra* note 20; Roberts (Stanislaus) v. Louisiana, *supra* note 20.

[94] Enmund v. Florida, *supra* note 14.

[95] Godfrey v. Georgia, *supra* note 41.

[96] Ga. Code Ann. § 26-1101(a)(b) (1972).

[97] Ga. Code Ann. § 27-2534.1(b) (Supp. 1975); *see* Gregg v. Georgia, 428 U.S. at 196-97 (opinion of Stewart, Powell, and Stevens, J.J.).

[98] Fla. Stat. Ann. § 782.04(1)(a) (Supp. 1975-1977).

[99] Fla. Stat. Ann. § 921.141(3) (Supp. 1976-1977); *see* Proffitt v. Florida, 428 U.S. at 255-56 (opinion of Stewart, Powell, and Stevens, J.J.).

[100] Tex. Penal Code § 19.02(a) (1974).

[101] Tex. Penal Code § 19.03(a) (1974), and Tex. Code Crim. Proc. Art. 37.071 (Supp. 1975-1976); *see* Jurek v. Texas, 428 U.S. at 268 (opinion of Stewart, Powell, and Stevens, J.J.).

Court narrowed the class of capital murders on the basis of premeditation.[102] Although some members of the Supreme Court have, on one occasion, observed that the listing of five statutory aggravated intentional murders in the Louisiana statute [103] constituted "a different and *somewhat* narrower definition" [104] of murder than did North Carolina's class of first degree murders, which includes any willful, deliberate, and premeditated homicide and any felony murder,[105] the Supreme Court has never held that this "somewhat narrower definition" is constitutionally required.

The constitutionality of Article 118, U.C.M.J., therefore, presents an issue of first impression: [106] Does the quintessential statutory aggravating factor, premeditation, provide sufficient narrowing upon a principled basis of the class of capital murders so as to satisfy *Furman*? To answer this question, it must be determined whether punishing some murderers by death because they premeditated their crime measurably contributes to either retribution or deterrence.[107] Because both of these penological goals are measurably enhanced by making the death penalty available as a sentencing option for premeditated murder, the military statutory aggravating factor, on its face, satisfies the constitutional requirement for principled narrowing.

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[102] *See* Beck v. Alabama, 447 U.S. 625 (1980); Eddings v. Oklahoma, *supra* note 15; Lockett v. Ohio, *supra* note 15; Roberts (Stanislaus) v. Louisiana, *supra* note 20; Woodson v. North Carolina, *supra* note 20.

[103] La. Rev. Stat. Ann. § 14.30 (1974).

[104] Roberts (Stanislaus) v. Louisiana, 428 U.S. at 332 (opinion of Stewart, Powell, and Stevens, J.J.) (emphasis supplied).

[105] N.C. Gen. Stat. §§ 14-17 (Cum. Supp. 1975).

[106] Some lower federal courts have ruled that the federal death penalty statute, 18 U.S.C. § 1111, is unconstitutional. For a listing of these cases, *see* United States v. Matthews, 13 M.J. at 530 n.23. These federal decisions interpreting the federal capital sentencing procedures are either incorrectly decided or inapposite with respect to Article 118(1), U.C.M.J. for at least the following four reasons. First, the military system, unlike its federal counterpart, provides for bifurcated trial proceedings and for the exclusion of irrelevant or tangential aggravating evidence in capital cases. *See supra* note 25. Second, United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977), the only federal case which provides a detailed analysis of *Furman* and its progeny, incorrectly concluded that premeditation fails to provide a sufficient, principled basis for narrowing as to aggravation. *See* notes 79-122, *supra* and *infra*, and accompanying text. Third, the federal courts incorrectly declined to fulfill their appellate role of construing the aggravating criterion of "premeditation" in a more narrow or principled manner, if necessary. *See* notes 38-169, *supra* and *infra*, and accompanying text. Indeed, some of the narrowing criteria available to military appellate courts are unavailable to civilian courts. *See, e.g.*, "military nexus," notes 129-152, *infra*, and accompanying text. Finally, additional procedural protections afforded to a military capital accused, which are unprecedented in civilian jurisdictions, guarantee that the imposition of the death penalty pursuant to Article 118(1), U.C.M.J. is constitutional even in its imposition pursuant to 18 U.S.C. § 1111 is not. *See* notes 247-304, *infra*, and accompanying text. For these reasons, federal cases interpreting the federal death penalty statute are either distinguishable or incorrectly decided.

[107] Enmund v. Florida, *supra* note 14; Gregg v. Georgia, *supra* note 3.

The penological goal of retribution is measurably served by punishing premeditated murderers with death. "It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm intentionally.' " [108] *A fortiori*, one who premeditates a murder is even more culpable than one who merely kills without premeditation. The legal concept of premeditation requires that the murderer conceive a conscious, specific intent to kill his victim at some time prior to the act which causes the victim's death.[109] Although the length of time intervening the formation of the intent to kill and the doing of the act which results in death is immaterial, [110] the law has long recognized that "it is the fully formed purpose, not the time, which constitutes the higher degree" of murder.[111] If "capital punishment is [in part] an expression of society's moral outrage at particularly offensive conduct," [112] and if few crimes are as "grievous an affront to humanity [as is premeditated murder, then] the only adequate response [to such a crime] may be the penalty of death." [113] Because the imposition of capital punishment upon those who take human life with premeditation measurably contributes to society's traditional expression of outrage against such crimes, Congress' limitation of the death penalty to this class of murderers satisfies the substantive concern of aggravation—principled narrowing. Premeditation is, therefore, a constitutionally permissible aggravating factor upon a retributive basis.

Perhaps even more compelling than the argument that punishing premeditated murder by death measurably serves the penological goal of retribution, is the argument that punishing premeditated murder by death measurably serves the penological goal of deterrence. The Supreme Court has said:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend

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[108] Enmund v. Florida, 102 S. Ct. at 3377, *quoting* H. Hart, Punishment and Responsibility 162 (1968).

[109] Paragraph 197*b*, Manual; *see* United States v. Jones, 26 C.M.R. 911, 915 (A.F.B.R. 1958).

[110] United States v. Goodman, 1 C.M.A. 170, 2 C.M.R. 76 (1952); *see* United States v. Wilson, 8 C.M.R. 256, 263 (A.B.R. 1951), *reversed on other grounds*, 2 C.M.A. 248, 8 C.M.R. 48 (1953) (premeditation may "involve only seconds" and may comprise only "a 'moment or instant of time' "); *see also* United States v. Ransom, 4 C.M.A. 195, 15 C.M.R. 195 (1954); Benchbook, *supra* note 26 at para. 3-86*b*.

[111] Commonwealth v. Scott, 284 Pa. 159, 130 A. 317, 319 (1925); *accord* People v. Donnelly, 190 Cal. 57, 210 P. 523 (1922). *But see* Austin v. United States, *supra* note 89.

[112] Gregg v. Georgia, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, J.J.).

[113] Enmund v. Florida, 102 S. Ct. at 3377, *quoting* Gregg v. Georgia, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, J.J.).

> that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious murder will not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia*, [428 U.S. 153, 186].[114]

A closer relationship between an aggravating circumstance for the death penalty and a penological goal which justifies the availability of the death penalty can hardly be imagined. Indeed, many of the state statutes which have passed constitutional muster upon review by the Supreme Court classify murder for pecuniary gain as a capital crime, principally because such killings are premeditated and might therefore be deterred.[115] Some other examples of statutory aggravating factors or circumstances which narrow the class of murders upon a deterrent basis (*i.e.*, those murders which are premeditated or suggestive of premeditation, or at least those murders which are intentional or suggestive of intent) include murder by direction or hire,[116] intentional killings where the offender knowingly creates a great risk of death to more than one person,[117] murder by one who has previously committed a capital or violent felony,[118] and murder by a prisoner while attempting to escape [119] or of a prison employee.[120]

Because Congress has elected in Article 118(1), U.C.M.J. to provide capital punishment as a sentencing option for all murderers who premeditate and might therefore be deterred, instead of only some murderers who premeditate and might therefore be deterred, the military criterion for narrowing capital murder is even more principled, at least upon a deterrence rationale, than the arguably narrower criteria employed by various states. True, legislative debate and academic discussion may be generated as to the relative merits of a single inclusive statutory criterion such as Article 118(1), as compared to the somewhat more limited, but perhaps less principled, multiple criteria employed by various states in their statutes. Equally true, however, is that the statutory denomination of premeditation in Article 118(1), as an aggravating factor for capital murder, measurably contributes to the penological goal of deterrence. Premeditation is, therefore, a constitutionally permissible aggravating factor upon a deterrent basis.

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[114] Enmund v. Florida, 102 S. Ct. at 3377-78.

[115] *See, e.g.*, Tex. Penal Code § 19.03(a)(3) (1974) (murder for remuneration); Fla. Stat. Ann. § 921.141(3)(g) (Supp. 1976-1977) (murder for pecuniary gain); Ga. Code Ann. § 27-2534.1(b)(4) (Supp. 1975) (murder for monetary gain).

[116] Ga. Code Ann. § 27-2534.1(b)(6) (Supp. 1975).

[117] *Id.* at § 27-2534.1(b)(3); Fla. Stat. Ann. § 775.082(3)(d) (Supp. 1976-1977).

[118] Fla. Stat. Ann. § 775.082(3)(b) (Supp. 1976-1977).

[119] Tex. Penal Code § 19.03(a)(4) (1974).

[120] *Id.* at § 19.03(a)(5).

The statutory aggravating factor contained in Article 118(1), U.C.M.J.—premeditation—narrows the class of murders for which death may be imposed in a principled manner consistent with the historical development of American law. An attack upon the military death penalty statute, therefore, must focus on whether "premeditation," although principled and narrow, is a sufficiently constrictive classification to satisfy *Furman* and its progeny. On the basis of its measurable contribution to deterrence and retribution, as discussed above, the authors submit that "premeditation" is a sufficiently circumscribed, constitutionally acceptable criterion for narrowing the class of capital murders in a principled fashion. Assuming, *arguendo*, that the class of capital murders as statutorily defined by Article 118(1) is too broad on its face to pass constitutional muster, the concept of premeditation can be further narrowed in a principled manner by military appellate courts so as to satisfy the Eighth Amendment.[121] This more narrow application of premeditation may be achieved, for example, by utilizing any of the four following illustrative[122] bases: premeditation as applied to murders which are especially calculated and deliberate; premeditation as applied to murders which are especially serious and offensive because of an intense military nexus; premeditation as applied to murders which are especially brutal, vile, heinous, and depraved; and premeditation as applied to murders which are committed in the course of a rape.

Premeditated murders which are especially calculated and deliberate are especially deserving of death.[123] Courts[124] and commentators[125] alike have traditionally recognized the enhanced culpability of premeditated murders who carefully contemplate their crimes, by suggesting that the premeditation instruction given to juries in capital cases include such phrases as a "second thought," a "turning over in the mind," or an "appreciable time." As previously noted, many of the post-*Furman* statutory aggravating factors focus upon the particularly calculated nature of a premeditated murder (*e.g.*, murder for pecuniary gain and murder for hire).[126] Clearly the penological goals of retribution and deterrence would be even more enhanced by making capital punishment available as a sentencing option to those who murder after engaging in an ex-

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[121] *See* Godfrey v. Georgia, *supra* note 41.

[122] It is emphasized that the bases discussed are only illustrative and are not exhaustive. *See supra* note 40.

[123] Gregg v. Georgia, 428 U.S. at 185–86 (opinion of Stewart, Powell, and Stevens, J.J.).

[124] *See, e.g.*, Fisher v. United States, 328 U.S. at 469–70; Austin v. United States, *supra* note 89.

[125] *See, e.g.*, LaFave and Scott, *supra* note 89; Cardozo, "What Medicine Can Do for Law," *reprinted in Law and Literature* 70, 96–101 (1931).

[126] *See* notes 115–120, *supra*, and accompanying text.

tended and calculated deliberation of their crime.[127] Such offenses are "so grievous an affront to humanity that the only adequate response may be the penalty of death." [128] For these reasons, extended calculation and deliberation may be used as a principled basis for construing Article 118(1), U.C.M.J. in a more narrow manner, if necessary, to satisfy the requirements of *Furman* and its progeny.

Premeditated murders are especially deserving of death when, by virtue of the special status of the perpetrator or the victim, or the special context of the crime, they are either so particularly provocative of society's outrage or so particularly conducive to the goal of deterrence that "capital punishment may be the [only] appropriate sanction." [129] Again with reference to the trilogy of Supreme Court cases which followed *Furman*, the opinions *Jurek*, *Proffitt*, and *Gregg*,[130] each addressed state statutes which, in part, utilized the status of the perpetrator, the status of the victim, or the context of the crime as a statutory aggravating circumstance upon which to support a sentence to death. As to the offender's status, both Georgia and Florida denominate murderers with prior capital convictions as a statutory aggravating circumstance; [131] and, Florida also lists as a statutory aggravating circumstance that the murder was perpetrated by a life convict.[132] As to the victim's status, both Georgia and Texas denominate the murder of police officers, prison employees, and firemen in the performance of their duty as statutory aggravating circumstances; [133] and, Georgia also lists as a statutory aggravating circumstance that the murder was perpetrated upon a present or former judicial officer, solicitor, or district attorney in the performance of his duty.[134] Finally, as to the specific circumstances of the offense, Georgia, Florida, and Texas each list as a statutory aggravating factor that the murder was committed during an escape

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[127] *See* Enmund v. Florida, 102 S. Ct. at 3377-78; Gregg v. Georgia, 428 U.S. at 182-87 (opinion of Stewart, Powell, and Stevens, J.J.); *cf.* Austin v. United States, *supra* note 89 (preferable premeditation instruction would require jury to find that accused had contemplated murder for an appreciable period of time). *But cf.* Model Penal Code, *supra* note 91, at § 201.6, comment at 70 (some impulse murders may be more death-deserving than premeditated murders).

[128] Enmund v. Florida, 102 S. Ct. at 3377; *accord* Gregg v. Georgia, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, J.J.).

[129] Gregg v. Georgia, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, J.J.).

[130] Jurek v. Texas, *supra* note 20; Proffitt v. Florida, *supra* note 19; Gregg v. Georgia, *supra* note 3.

[131] Ga. Code Ann. § 27-2534.1(b)(1) (Supp. 1975); Fla. Stat. Ann. § 921.141(3)(a) (Supp. 1976-1977).

[132] Fla. Stat. Ann. § 921.141(3)(a) (Supp. 1976-1977).

[133] Ga. Code Ann. § 27-2534.1(b)(8) (Supp. 1975); Tex. Penal Code § 19.03(a)(1) & (5) (1974).

[134] Ga. Code Ann. § 27-2534.1(b)(5) (Supp. 1975).

from confinement or custody; [135] Georgia and Florida each list as a statutory aggravating factor that the murder was committed with knowing risk of death to many; [136] and, Georgia lists as a statutory aggravating factor that the murder was committed in order to prevent an arrest.[137] Even a cursory review of these and other post-*Furman* capital sentencing statutes reveals the significance which has been attached to the offender's and victim's status and to the aggravating context of the offense.[138] Underscoring the importance of status and context with respect to the principled narrowing of murder, a majority of the Supreme Court has consistently reserved judgment as to whether *mandatory* sentences may be imposed upon life convicts who intentionally kill.[139]

Both Congress and military courts-martial have long reflected society's view that, because of the special status of servicemembers and the unique environment in which they work, otherwise tolerable behavior can become criminal when perpetrated by a servicemember in the military context. The Supreme Court has recognized that the "differences . . . between the military community and the civilian community . . . continue to the present day under the Uniform Code of Military Justice." [140] Thus, crimes such as disrespect and disobedience,[141] although quite serious in the military context,[142] have no counterpart in civilian society. A servicemember's status and the requirements of military service likewise elevate the mere failure of a citizen to go to the workplace to a serious criminal offense.[143] Indeed, the range of nonculpable behavior which is transformed into criminal offenses by various articles of the U.C.M.J.[144] manifests the need to apply penal sanctions to military personnel distinct from the application of penal sanctions in civilian society.[145]

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[135] Ga. Code Ann. § 27-2534(b)(9) (Supp. 1975); Fla. Stat. Ann. § 921.141(3)(f) (Supp. 1976-1977); Tex. Penal Code § 19.03(a)(4) (1974).

[136] Ga. Code Ann. § 27-2534.1(b)(3) (Supp. 1975); Fla. Stat. Ann. § 921.141(3)(d) (Supp. 1976-1977).

[137] Ga. Code Ann. § 27-2534.1(b)(10) (Supp. 1975).

[138] *See also* Roberts (Stanislaus) v. Louisiana, *supra* note 20; Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690 (1974).

[139] *See* Roberts (Harry) v. Louisiana, 431 U.S. at 635 n.2, 637 n.5; Woodson v. North Carolina, 428 U.S. at 287 n.7, 292-93 n.25 (opinion of Stewart, Powell, and Stevens, J.J.); Gregg v. Georgia, 428 U.S. at 186 (opinion of Stewart, Powell, and Stevens, J.J.); *see also* United States v. Matthews, 13 M.J. at 525 n.16.

[140] Parker v. Levy, 417 U.S. 740, 749 (1974).

[141] U.C.M.J. arts 89-91.

[142] *See* J. O'Brien, A Treatise on American Military Laws 82 (1846).

[143] U.C.M.J. art. 86; *see* United States v. Davenport, 9 M.J. 364, 368 (C.M.A. 1980).

[144] *See, e.g.*, U.C.M.J. arts. 92, 133 and 134.

[145] *See generally* Alley, *The Overseas Commander's Power to Regulate Private Life*, 37 Mil. L. Rev. 57 (1967).

Just as a soldier's status and environment may determine whether his otherwise innocuous behavior is cast as criminal, these same factors may also serve to exacerbate the gravity of his crimes. Military courts have historically recognized the "special niche of infamy" reserved for those larcenies perpetrated by a servicemember against a fellow soldier in a barracks environment.[146] Although drug offenses are proscribed as criminal in civilian jurisdiction, such crimes have been characterized as being especially serious in the military context. [147] As these examples illustrate, a soldier's status and the military environment wherein he serves may constitute a principled basis upon which to apply more severe penal sanctions.

The narrowing effect of military status and military environment, as they relate to aggravation, are especially appropriate to the crime of premeditated murder.[148] As noted, society is justifiably outraged when a life is taken with premeditation. As also noted, the concept of deterrence is most appropriate when applied to one who premeditates his acts. The penological goals of retribution and deterrence, however, are even more enhanced when applied to the premeditated murder by a servicemember, of a victim with a military nexus, that occurs within a military environment.

The enhanced sense of outrage felt toward such crimes is obvious. Soldiers are accorded a special status by society. Among other things, soldiers are taught the skills of killing, are furnished weapons to facilitate their skills, and are entrusted with the responsibility of applying their craft with extreme circumspection. These considerations are not voiced in a speculative or analytical vacuum. The military is charged with the very real task of national defense. American society depends upon servicemembers in a tangible and immediate sense to protect its way of life and defend its national borders and interests. When a servicemember violates this special trust and kills with premeditation for personal purposes, the natural and justifiable outrage felt by society is especially intense.[149] When other aggravating indicia are present—*e.g.*, a

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[146] United States v. Thurman, 10 C.M.A. 377, 381, 27 C.M.R. 451, 455 (1959); *accord* United States v. Usry, 9 M.J. 701, 703 (N.C.M.R.), *pet. denied*, 9 M.J. 402 (C.M.A. 1980).

[147] *See generally* Committee for G.I. Rights v. Callaway, 518 F.2d 466, 476-77 (D.C. Cir. 1975); United States v. Trottier, 9 M.J. 337, 345-48 (C.M.A. 1980).

[148] *Cf.* United States v. Kick, 7 M.J. 82, 84 (C.M.A. 1979) (there is a special need in the military to make the killing of another as the result of simple negligence a criminal act; thus, the Codal proscription of negligent homicide is not rendered unlawful by civilian case law which requires a higher degree of negligence in order to punish a civilian in a criminal court for homicide).

[149] *Cf.* United States v. Kick, *supra* note 148 (military society sufficiently outraged by a servicemember's negligent homicide to warrant criminally punishing the servicemember).

military nexus of the victim or an on-post or foreign situs of the crime—society's retributive outcry is further intensified.

The enhanced need for deterrence present with respect to such crimes is equally obvious. Because servicemembers are taught the skill of killing, provided with the means of killing, and maintained in a state of readiness which diminishes the innate human inhibitions against killing, the necessity for having an effective deterrent to prevent premeditated murder takes on added significance. Beyond all of this, servicemembers are required to obey orders that potentially imperil life and limb. The possibility of suffering a violent death or being required to kill another human being is a reality that all members of the armed forces must unreservedly accept as incident to the profession of arms. The death penalty may be the only effective deterrent, for example, where a soldier murders a superior with premeditation in order to escape the vagaries of combat.[150] The Court of Military Appeals has observed, with respect to the crime of negligent homicide by a servicemember, that "[t]he danger to others from careless acts is so great that society demands protection." [151] As the danger to society is greater when a servicemember kills with premeditation, so too is the need greater to deter such a crime.

In short, the penological goals of retribution and deterrence are even more enhanced by the availability of capital punishment as a sentencing option for those premeditated murders where the status of the perpetrator or victim, or the context of the crime, implicates the military mission and thus threatens society.[152] For these reasons, military status and military environment is a principled basis for construing Article 118(1), U.C.M.J. in a more narrow manner in satisfying the requirements of *Furman* and its progeny.

In response to *Furman's* direction for principled narrowing of capital offenses, numerous state legislatures enacted capital sentencing statutes which provide as an aggravating circumstance that the murder was perpetrated in a particularly brutal, heinous, or depraved manner.[153] Long

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[150] *Cf.* U.C.M.J. art. 90 (death penalty is a permissible punishment for disobedience in time of war).

[151] United States v. Kick, 7 M.J. at 84, *quoting* United States v. Ballew, CM 434077 (A.C.M.R. 16 July 1976), slip op. at 2 (unpublished).

[152] *Cf.* Gregg v. Georgia, 428 U.S. at 186 (opinion of Stewart, Powell, and Stevens, J.J.) ("there are some categories of murder, such as murder by a life prisoner, where other sanctions [besides capital punishment] may not be adequate"). Congress historically has recognized that the need for capital punishment for certain offenses in the military is totally distinct from the need for this penal sanction in civilian jurisdictions. *See generally* Winthrop, Military Law and Precedents, Appendix VIII at 947 (2d ed. 1920).

[153] *See, e.g.*, Ga. Code Ann. § 27-2534.1(b)(7) (Supp. 1975) ("outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"); Fla. Stat. Ann. § 775.082(3)(h) (Supp. 1976-1977) ("especially heinous, atrocious, or cruel, manifesting exceptional depravity").

ago the Court of Military Appeals recognized the aggravated, and indeed premeditated, character of a murder which is accomplished in an especially brutal and depraved manner, when it first observed that "vicious assaults resulting in multiple grievous injuries bespeak a premeditated design to kill." [154] As long as the concept of "depravity" is applied with sufficient construction to distinguish those murders which are especially outrageous from those which are not,[155] that criterion satisfies the constitutional requirement for principled narrowing of murder.[156]

Although punishing particularly depraved murderers more severely would serve the penological goal of deterrence because of the relationship between depravity and premeditation,[157] the primary motivation for sentencing especially brutal killers to death is to express "society's moral outrage at particularly offensive conduct." [158] Indeed, "in extreme cases . . . the only adequate response may be the penalty of death." [159] For these reasons, depravity and cruelty are a principled basis for construing Article 118(1), U.C.M.J. in a more narrow manner, if necessary, to satisfy the requirements of *Furman* and its progeny.

"Short of homicide, [rape] is the "ultimate violation of self.' " [160] In recognition of its severity, post-*Furman* capital sentencing statutes have commonly set forth the concomitant commission of rape as a statutory aggravating factor for distinguishing death-deserving homicides from those which are less serious.[161] Indeed, in response to *Furman*, 16 states

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[154] United States v. Harris, 6 C.M.A. 736, 741, 21 C.M.R. 58, 63 (1956), *citing* United States v. Riggins, 2 C.M.A. 451, 9 C.M.R. 81 (1953); *accord* United States v. Ayers, 14 C.M.A. 336, 343, 34 C.M.R. 116, 123 (1964); United States v. Matthews, 13 M.J. at 517; *see generally* 2 Wharton's Criminal Law (14th ed., 1979), § 140.

[155] *See* Proffitt v. Florida, 428 U.S. at 255 (opinion of Stewart, Powell, and Stevens, J.J.); State v. Dixon, 283 So. 2d at 9; *cf.* Godfrey v. Georgia, 446 U.S. at 428-33 (opinion of Stewart, J.) (application of the criterion "depravity" as a conclusory "catch-all" device provides insufficient principled narrowing for the crime of murder).

[156] *Cf.* Coker v. Georgia, 433 U.S. at 599 (opinion of White, J.), and 601 (Powell, J., concurring in part and dissenting in part) (the depravity with which the rape of an adult woman is accomplished is not a distinguishing factor for the imposition of death).

[157] *See* United States v. Ayers, *supra* note 154; United States v. Harris, *supra* note 154; United States v. Riggins, *supra* note 15; United States v. Matthews, *supra* note 5; 2 Wharton's Criminal Law, *supra* note 154, at § 140.

[158] Gregg v. Georgia, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, J.J.). As depravity would be used as a benchmark to narrow a "premeditated" murder under this analysis, the penological goal of deterrence is likewise served. *See* notes 114-120, *supra*, and accompanying text.

[159] Gregg v. Georgia, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, J.J.).

[160] Coker v. Georgia, 433 U.S. at 597 (opinion of White, J.), *citing* U.S. Dep't of Justice, Law Enforcement Assistance Administration Report, *Rape and its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies* 1 (1975), *quoting* Bard & Ellison, *Crisis Intervention and Investigation of Forcible Rape*, The Police Chief (May 1974), reproduced as Appendix I-B to the Report.

[161] *See, e.g.*, Ga. Code Ann. § 27-2534.1(b)(2) (Supp. 1975); Fla. Stat. Ann. § 921.141(3)(c) (Supp. 1976-1977); Tex. Penal Code § 19.03(a)(2) (1974).

have enacted capital sentencing statutes which authorize capital punishment for rape, unaccompanied by murder, under certain circumstances.[162]

Rape is likewise viewed as a serious crime in the military criminal system.[163] The congressional intent that rape can be used to distinguish those premeditated murderers who warrant a death sentence from those who may not is reflected by the language of Article 118(4), U.C.M.J. which provides that even murderers who do not act with premeditation in the commission of a homicide may be sentenced to death if they commit a rape in the course of that murder.

The utilization of rape as a distinguishing aggravating criterion for narrowing the class of capital, premeditated murders measurably serves the penological goal of retribution. If society is especially outraged by one who murders with premeditation, society is all the more outraged by one who also rapes while perpetrating such a crime for [r]ape is never an act committed accidentally." [164] Death may be the only appropriate expression of society's retributive outcry in such a circumstance.[165] Moreover, the retributive outcry which is ordinarily engendered by a rape-murder is exacerbated when perpetrated by a servicemember, especially when committed abroad or on-post, or when it involves a victim with a military nexus or affects the military's mission.[166]

Using rape as a distinguishing aggravating criterion for premeditated murder likewise measurably serves the penological goal of deterrence. Society especially needs the death penalty to deter rapists from murdering their victims. Because the maximum punishment for rape in the military is life imprisonment,[167] rapists would possess little incentive to spare the lives of the most immediate witnesses to their crimes, their victims, if the death penalty did not exist for premeditated murder.[168]

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[162] Coker v. Georgia, 433 U.S. at 593-96 (opinion of White, J.); *see generally* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, *supra* note 138.

[163] Article 120, U.C.M.J. authorizes capital punishment for the crime of rape. *But see* note 5 *supra*.

[164] Coker v. Georgia, 433 U.S. at 603 (Powell, J., concurring in part and dissenting in part); *see also* note 160, *supra*, and accompanying text.

[165] *See* Gregg v. Georgia, 428 U.S. at 183-84 (opinion of Stewart, Powell, and Stevens, J.J.).

[166] *See* notes 129-152, *supra*, and accompanying text.

[167] See *supra* note 5.

[168] *Cf.* Coker v. Georgia, 433 U.S. at 609 n.4 (Burger, C.J., dissenting) (life convict has little incentive not to commit rape or murder in absence of death penalty); Woodson v. North Carolina, 428 U.S. at 287 n.7 (opinion of Stewart, Powell, and Stevens, J.J.) (mandatory death penalty may be appropriate for life convicts who commit murder). Deterrence is further served by sentencing rape-murderers to death because, as noted "[r]ape is never an act committed accidentally." Coker v. Georgia, 433 U.S. at 603 (Powell, J, concurring in part and dissenting in part).

Accordingly, the availability of capital punishment for murder may be the only means of protecting the life of a rape victim.[169] For these reasons, a concomitant rape is a principled basis for construing Article 118(1), U.C.M.J. in a more narrow manner, if necessary, to satisfy the requirements of *Furman* and its progeny.

As noted, the role of aggravating factors in capital sentencing systems, as established by *Furman* and its progeny, has two components: a procedural component for sentencing guidance,[170] and a substantive component for principled application.[171] As to the first component, the military procedures, which virtually parallel those favorably reviewed by the Supreme Court in *Jurek v. Texas*,[172] adequately guide sentencing discretion by requiring the court members to find the statutory aggravating factor beyond a reasonable doubt on the merits before they may sentence a military accused to death.[173] As to the second component, the military capital sentencing procedures insure principled application of the death penalty, because a military accused must be found guilty of committing a murder based upon the quintessential aggravating criterion for capital punishment, "premeditation," and because military appellate courts can apply "premeditation" [174] to more narrowly drawn and principled classes embraced by the statutory aggravating factor (i.e., that it was especially calculated and deliberate,[175] that it had a close military nexus,[176] that it was especially depraved,[177] and that it occurred concomitantly with a rape [178]).

C. *APPELLATE REVIEW*

The Supreme Court has never held that appellate courts must review capital cases any differently than they review other criminal cases.[179] *Furman* and its progeny focus upon the constitutionality of a capital sentencing system on a system-wide basis.[180] Accordingly, any requirement for unusual appellate procedures in capital cases is inversely propor-

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[169] Rapists, even more than murderers, present a strong case for incapacitation (*see* note 66, *supra*) by virtue of their propensity to "repeatedly engage[] in violent, combative behavior." Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1080 (1964), *quoted in* Coker v. Georgia, 433 U.S. at 609 (Burger, C.J., dissenting).

[170] *See* notes 29-37, *supra*, and accompanying text.

[171] *See* notes 38-78, *supra*, and accompanying text.

[172] Jurek v. Texas, *supra* note 20.

[173] *See* notes 29-37, *supra*, and accompanying text.

[174] *See* notes 79-120, *supra*, and accompanying text.

[175] *See* notes 123-128, *supra*, and accompanying text.

[176] *See* notes 129-152, *supra*, and accompanying text.

[177] *See* notes 153-159, *supra*, and accompanying text.

[178] *See* notes 160-169, *supra*, and accompanying text.

[179] United States v. Matthews, 13 M.J. at 526.

[180] *See* notes 247-264, *infra*, and accompanying text.

tional to the adequacy of a system's trial-phase procedures.[181] In *Gregg*, the "centrist plurality" found that Georgia's trial-level procedures satisfied the constitutional concerns enunciated in *Furman* and, thereafter, the plurality repeatedly characterized Georgia's detailed provisions for appellate review of capital cases as "additional" safeguards against arbitrary and capricious death sentences.[182] In approving the Florida capital sentencing system, the "centrist plurality" similarly discussed the Florida Supreme Court's interpretation of its role in reviewing capital cases only after the plurality had held that Florida's trial procedures "assure that the death penalty will not be imposed in an arbitrary or capricious manner." [183] The "centrist plurality" similarly approved the Texas capital sentencing system, although neither the Texas statute nor the Texas appellate courts had specified different procedures for review of capital cases than for review of noncapital cases.[184] In *Godfrey*, on the other hand, a plurality of the United States Supreme Court reversed a death sentence because the Georgia Supreme Court had failed to apply an overly broad statutory aggravating factor in a narrow and principled fashion.[185]

Although the Eighth Amendment thus does not require the use of any exceptional procedures for reviewing capital cases, the "centrist plurality" has envisoned that appellate courts should exercise their powers "to promote the evenhanded, rational, and consistent imposition of death sentences" [186] by insuring that the death penalty is adjudged only for death-deserving offenders who commit death-deserving offenses.[187] Accordingly, appellate courts may not find an accused to be death-deserving if the trial judge precluded the accused from offering evidence of a relevant character trait in extenuation and mitigation.[188] Similarly, appellate courts must insure that the sentencing authority is not instructed to provide undue weight to any evidence in aggravation.[189] Appellate courts also must provide a narrow construction of aggravating

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[181] *Compare, e.g.*, Gregg v. Georgia, *supra* note 3, *with e.g.*, Godfrey v. Georgia, *supra* note 41.

[182] Gregg v. Georgia, 428 U.S. at 198, 204, 207 (opinion of Stewart, Powell, and Stevens, J.J.).

[183] Proffitt v. Florida, 428 U.S. at 253 (opinion of Stewart, Powell, and Stevens, J.J.).

[184] Jurek v. Texas, 428 U.S. at 276 (opinion of Stewart, Powell, and Stevens, J.J.). One commentator has noted that the plurality opinions in *Jurek, Proffitt,* and *Gregg* "fail to clarify the precise role—if any—that the Eighth Amendment requires appellate courts to play in state capital sentencing procedures." Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 100, 102-03 (1979).

[185] *See* Godfrey v. Georgia, *supra* note 41 (opinion of Stewart, J.).

[186] Jurek v. Texas, 428 U.S. 276 (opinion of Stewart, Powell, and Stevens, J.J.); *see* Proffitt v. Florida, 428 U.S. at 253 (opinion of Stewart, Powell, and Stevens, J.J.).

[187] Jurek v. Texas, 428 U.S. at 269 (opinion of Stewart, Powell, and Stevens, J.J.).

[188] *See* Eddings v. Oklahoma, *supra* note 15.

[189] *See* Zant v. Stephens, 102 S. Ct. 1856 (1982), *on remand*, 297 S.E.2d 1 (Ga. 1982).

factors to insure that the accused's offense is sufficiently serious to be death-deserving.[190] Finally, the reviewing court must be provided a transcript of all evidence considered by the sentencing authority in order to insure that the sentencer as not subject to capricious influences.[191]

In short, the Supreme Court has envisioned that where the trial procedures of a capital sentencing system are constitutionally sufficient, appellate courts must insure that those procedures are followed properly.[192] Where, on the other hand, those trial procedures are inadequate, a death sentence will be reversed unless the appellate courts interpret and apply those procedures in a constitutional manner.[193] The military appellate courts are fully empowered to perform, as necessary, the constitutional role of "promot[ing] evenhanded, rational, and consistent" [194] imposition of the death penalty.

The courts of military review are fully empowered to perform this constitutional role. In the military capital sentencing system, the aggravating factor which makes an offense death-deserving is established at findings when the accused is found guilty of an aggravated, death-deserving offense.[195] The exercise by the courts of military review of their duty to affirm a conviction only if it is supported by the evidence beyond a reasonable doubt [196] insures that the offense is truly death-deserving.[197] Similarly, the statutory mandate that the courts of review may affirm

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[190] *See* Godfrey v. Georgia, *supra* note 41.

[191] *See* Gardner v. Florida, 430 U.S. 349 (1977). In *Gardner*, the Court stated that "it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." *Id.* at 361. This language does not require that the sentencing authority articulate the precise reasons why the death sentence is adjudged. Thus, under the Florida capital sentencing system, evidence may be presented as to both statutory and nonstatutory aggravating circumstances. Proffitt v. Florida, 428 U.S. at 248 (opinion of Stewart, Powell, and Stevens, J.J.). Moreover, the sentencing authority is directed to balance subjectively the mitigating and aggravating evidence found to exist. *Id.*; Fla. Stat. Ann. §§ 921.141(2)(b) & (c) (Supp. 1976–77). Similarly, in Georgia, the sentencer is permitted to consider such nonstatutory aggravating circumstances as prior convictions even after finding a statutory aggravating circumstance. Ga. Code Ann. §§ 27-2503(a) & (b); *see* Zant v. Stephens, 297 S.E.2d 1 (Ga. 1982). Thus, in both Florida and Georgia, the finding of a statutory aggravating factor does not reveal the precise reason why the death sentence was adjudged. Therefore, the quoted language from *Gardner* establishes only that the reviewing authority must be provided a complete record of all matters considered by the sentencing authority.

[192] *See* Jurek v. Texas, *supra* note 20.

[193] *See* Godfrey v. Georgia, *supra* note 41.

[194] Jurek v. Texas, 428 U.S. at 176 (opinion of Stewart, Powell, and Stevens, J.J.).

[195] United States v. Matthews, 13 M.J. at 530; notes 29–37, *supra*, and accompanying text; *cf.* Jurek v. Texas, *supra* note 20 (Texas sentencing authority finds statutory aggravating factor by finding the accused guilty of aggravated capital murder).

[196] U.C.M.J. art. 66(c).

[197] *See* Jurek v. Texas, *supra* note 20; Proffitt v. Florida, *supra* note 19; Gregg v. Georgia, *supra* note 3.

only such "sentence or such part or amount of the sentence as [they find] correct in law" [198] necessarily implies that the courts may not affirm a death sentence unless "the statutory and nonstatutory [199] aggravating factors in the case outweigh the mitigating factors." [200] Finally, in capital cases, the courts of military review are implicitly directed to affirm a capital sentence only if "the death sentence is not excessive or disproportionate, considering both the nature and circumstances of the offense, the aggravating and mitigating factors, and the background and character of the appellant." [201]

In *Matthews*, the United States Army Court of Military Review performed these functions. First, the court found that the evidence supported the members' finding of premeditation beyond a reasonable doubt.[202] The court concluded that the evidence in aggravation [203] outweighed the evidence in extenuation and mitigation.[204] Finally, in finding that Matthews' death sentence was "patently appropriate," [205] the court necessarily concluded that the sentence was "not excessive or disproportionate, considering both the nature and circumstances of the offense, the aggravating and mitigating factors, and the background and character of the appellant." [206]

The Court of Military Appeals is similarly empowered "to promote the evenhanded, rational, and consistent imposition of death sentences under law." [207] The court's limited power to review factual findings [208] provides an additional guarantee that the evidence supports the finding

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[198] U.C.M.J. art. 66(c).

[199] In military capital cases, only a limited range of nonstatutory aggravating evidence is admissible at sentencing. *See* supra note 25. The admissibility of such evidence which is not related to a statutory aggravating circumstance does not undermine the constitutionality of the military capital sentencing system. *See* Jurek v. Texas, *supra* note 20; Gregg v. Georgia, *supra* note 3; United States v. Matthews, *supra* note 5; Ga. Code Ann. § 27-2503 (Supp. 1975); Tex. Code Crim. Proc., Art. 37-071(a) (Supp. 1975-1976); *See also* Zant v. Stephens, *supra* note 189.

[200] United States v. Matthews, 13 M.J. at 528.

[201] *United States v. Matthews*, 13 M.J. at 520; *see* U.C.M.J. art. 66(c). The courts of military review may affirm a sentence only if they find "it [to be] correct in law." U.C.M.J. art. 66(c). This limitation permits the courts of military review to insure that arguably overbroad statutory aggravating factors are applied in a narrow and principled manner. *See* Godfrey v. Georgia, *supra* note 41; Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947); notes 38-78, *supra*, and accompanying text.

[202] United States v. Matthews, 13 M.J. at 517.

[203] In United States v. Matthews, *supra* note 5, the government's evidence in aggravation was related solely to the statutory aggravating factor of premeditation and to the circumstances surrounding the murder and rape, and no additional evidence in aggravation was offered during sentencing.

[204] United States v. Matthews, 13 M.J. at 532.

[205] *Id.* at 533.

[206] *Id.* at 528.

[207] Jurek v. Texas, 428 U.S. at 276 (opinion of Stewart, Powell, and Stevens, J.J.).

[208] *See* United States v. Wilson, 13 M.J. 247 (C.M.A. 1982); U.C.M.J. art. 67(d).

of a statutory aggravating factor. Further, the court's power "with respect to matters of law" [209] provides a means of insuring that military capital sentencing procedures are correctly applied. This power would similarly permit the Court of Military Appeals to apply statutory aggravating factors in a narrow and principled manner.[210] Finally the Court of Military Appeals may not affirm arbitrary and capricious sentences.[211] This limitation insures that "the sentence of death [will not be] imposed under the influence of passion, prejudice, or any other arbitrary factor." [212] In light of the foregoing, appellate review by the courts of military review and by the Court of Military Appeals comports fully with the Eighth Amendment.

A contention that there are no articulable standards to review in military capital cases [213] misperceives the operation of the military capital sentencing system. The statutory aggravating factor, which the members must find on the merits, provides the "standard" for appellate review, and the finding of this statutory aggravating factor is sufficient to make the offense death-deserving.[214] As in the Georgia capital sentencing system, the statutory aggravating factor found at the court-martial "serves as a bridge that takes the [members] from the general class of all murders to the narrow class of offenses the . . . legislature had determined warrant the death penalty." [215] As the members explicitly find this aggravating factor on the merits, the decision at trial in military courts-martial is sufficiently guided by explicit "standards" which "make rationally reviewable the process for imposing a sentence of death." [216] Both the courts of military review and the Court of Military Appeals must, in turn, review this "standard," albeit with different levels of scrutiny.[217] Appellate review of military capital cases is consequently guided by definite and principled standards.

Contrary to the view of some,[218] there is no requirement that military appellate courts, as a necessary part of appellate review in every capital

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[209] U.C.M.J. art 67(d).

[210] *See* Godfrey v. Georgia, *supra* note 41; Oklahoma v. United Sates Civil Serv. Commn'n *supra* note 201; notes 38-78 *supra*, and accompanying text.

[211] United States v. Christopher, 13 C.M.A. 231, 236-37, 32 C.M.R. 231, 236-37 (1962); *see* U.C.M.J. art 67(d); *see also* United States v. Dukes, 5 M.J. 71, 73-74 (C.M.A. 1973).

[212] Ga. Code Ann. § 27-2537 (Supp. 1975); *cf.* Furman v. Georgia 408 U.S. 255-56 (Douglas, J., concurring) (discretionary death penalty statutes unconstitutionally permit death penalty to be imposed on basis of racial and social discrimination).

[213] *See* United States v. Matthews, 13 M.J. at 542-43 (Jones, S.J., dissenting).

[214] *See* Jurek v. Texas, *supra* note 20; notes 79-122 *supra*, and accompanying text.

[215] Zant v. Stephens, 102 S. Ct. at 1858.

[216] Woodson v. North Carolina, 428 U.S. at 303 (opinion of Stewart, Powell, and Stevens, J.J.).

[217] *Compare* U.C.M.J. art 66(c) *with* U.C.M.J. art 67(d).

[218] United States v. Matthews, 13 M.J. at 543 n.25 (Jones, S.J., dissenting).

case, compare an approved death sentence with the approved sentence in other similar cases, *i.e.*, conduct a "uniformity" analysis. First, the Supreme Court has never mandated such sentence comparison in any of its death penalty decisions. The Court, in fact, has never required that capital cases be reviewed differently than are other criminal cases.[219]

Second, such sentence comparison would be an extraordinary practice which should not be required in the absence of a clear mandate by the Supreme Court.[220] "Generally, the appropriateness of an accused's sentence is to be determined without reference or comparison to sentences in other cases." [221] This preference for individualized sentences is reflected in the Supreme Court cases which hold that all relevant evidence in extenuation and mitigation is admissible in capital cases, because "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases." [222] Requiring appellate courts to engage in sentence comparison as a matter of sentence appropriateness certainly would denigrate the "respect due the uniqueness of the individual." [223] Such an extraordinary practice as sentence comparison should not be attempted where existing appellate powers and practices are sufficient "to promote the evenhanded, rational, and consistent imposition of death sentences." [224]

Third, such sentence comparison would be extremely difficult in light of the Supreme Court's decisions regarding the admissibility of evidence in capital cases. With the decisions in *Jurek*, *Proffitt*, *Gregg*, and *Furman*,[225] the Supreme Court explicitly sought to inject greater certainty and consistency into capital sentencing in order to insure more uniform results.[226] In *Eddings*, *Bell*, *Lockett*, *Roberts (Stanislaus)*, and *Wood-*

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[219] United States v. Matthews, 13 M.J. at 526; *see* Gregg v. Georgia, *supra* note 3; Proffitt v. Florida, *supra* note 19; Jurek v. Texas, *supra* note 20; *see generally* Dix, *supra* note 184, at 97, 100, 102-03.

[220] *Cf.* United States v. Williams, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981) (exclusionary rule will not be applied to illegally seized evidence because, *inter alia*, the rule is not of constitutional dimension and its application would impose heavy cost on society).

[221] United States v. Olinger, 12 M.J. 458, 460 (C.M.A. 1982), *citing* United States v. Mamaluy, 10 C.M.A. 102, 106, 27 C.M.R. 176, 180 (1950).

[222] Lockett v. Ohio, 438 U.S. at 605 (opinion of Burger, C.J.); *see also* Eddings v. Oklahoma, *supra* note 15; Roberts (Harry) v. Louisiana, *supra* note 9; Woodson v. North Carolina, *supra* note 20.

[223] Lockett v. Ohio, 438 U.S. at 605 (opinion of Burger, C.J.).

[224] Jurek v. Texas, 428 U.S. at 276; *see* notes 305-323, *infra*, and accompanying text.

[225] Jurek v. Texas, *supra* note 20; Proffitt v. Florida, *supra* note 19; Gregg v. Georgia, *supra* note 3; Furman v. Georgia, *supra* note 1.

[226] *See* Furman v. Georgia, 408 U.S. at 252 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

son,[227] however, the Supreme Court necessarily injected less certainty into such systems by requiring that sentencing authorities be permitted to give "independent mitigating weight" [228] to all relevant evidence in extenuation and mitigation.[229] Because facially inconsistent sentences to death and to life imprisonment in similar cases may be constitutionally explained by the presence in the latter instance of evidence in extenuation and mitigation, appellate review for uniformity cannot be undertaken with any acceptable degree of certainty without a requirement that the sentencing body render special findings of the reasons for the adjudged sentence.[230] The Supreme Court, however, has implicitly rejected such a requirement.[231]

Fourth, even if appellate authorities do not conduct a uniformity review on a *sua sponte* basis, those persons convicted of capital offenses would be able to show that the capital sentencing system was unconstitutional because it did not produce uniform results.[232] An accused could rely on the concerns which impelled Justices Douglas, Stewart, and White in *Furman*, by showing that the system was "pregnant with discrimination," [233] that he was among "a capriciously selected random handful upon whom the sentence of death has in fact been imposed," [234] or that there was "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." [235] Such an approach to uniformity would be preferable to mandatory uniformity review because it would correctly place the burdens of production and persuasion on the party challenging the constitutionality of the statute.[236] Moreover, this alternative approach

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[227] Eddings v. Oklahoma, *supra* note 15; Bell v. Ohio, *supra* note 15; Lockett v. Ohio, *supra* note 15; Roberts (Stanislaus) v. Louisiana, *supra* note 20; Woodson v. North Carolina, *supra* note 20.

[228] Lockett v. Ohio, 438 U.S. at 605 (opinion of Burger, C.J.).

[229] *See generally* Radin, *supra* note 12, at 1150, 1180-81 (1980) (discussing "the *Furman-Lockett* paradox"). In *Lockett*, Justice Rehnquist opined that the plurality opinion of Chief Justice Burger in that case "will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it." Lockett v. Ohio, 438 U.S. at 631 (Rehnquist, J., dissenting).

[230] Such special findings are not authorized in courts-martial tried by members (*see* paragraph 74*i*, Manual), which includes all capital cases. *See* U.C.M.J. art 18; paragraph 53, Manual. In fact, for purposes of review for uniformity, it would be more useful to have such special findings in capital cases where death is not adjudged, rather than in cases where death is adjudged, in order to determine upon what evidence the sentencing decision rested.

[231] *See supra* note 192.

[232] *See generally* notes 305-323, *infra*, and accompanying text.

[233] Furman v. Georgia, 408 U.S. at 257 (Douglas, J., concurring).

[234] *Id.* at 309-10 (Stewart, J., concurring).

[235] *Id.* at 313 (White, J., concurring).

[236] *See* Fullilove v. Klutznick, 448 U.S. 136 (1982); Fleming v. Nestor, 363 U.S. 602 (1970).

would largely avoid the difficult and undesirable task of examining the reasons for mercy in an individual case, a task which contravenes the salutory principle of individualized sentencing.[237] Rather, the analysis employed by Justices Douglas, Stewart, and White in *Furman* would properly focus upon the aggregate results in a capital sentencing system and find constitutional error only where the results exceed "*relative* (numerical) uniformity," [238] as neither *Furman* nor its progeny "suggests that the decision to afford an indivdiual defendant mercy violates the Constitution." [239]

Even assuming that the Eighth Amendment did require appellate courts to conduct uniformity analysis in every capital case, the military appellate courts are fully empowered to do so. The broad power given the courts of military review over sentences [240] was intended to "be exercised to avoid excessive or disproportionate sentences throughout the armed forces for similar offenses." [241] The Army Court of Military Review exercised this power in *Matthews*, for example, when it specifically found that the appellant's "murder [was] one of the worst to come before this court in terms of its depravity, brutality and viciousness" and, therefore, it found "no difficulty distinguishing this case from other cases in which a lesser sentence was imposed." [242]

The Court of Military Appeals is also empowered to conduct uniformity review on a *sua sponte* basis. Although the court's review of sentences is limited to "matters of law," [243] an assumed constitutional requirement such as uniformity review is necessarily a matter of law.[244] Indeed, the court's duty to affirm only those sentences which are not "arbitrary, capricious or one which no reasonable" court would affirm [245] provides the vehicle for the court's exercise of uniformity review. If such uniformity review is of constitutional dimension, then the Court of Military Appeals can and should construe its power under Article 67(d), U.C.M.J. to include the power to conduct such a review.[246] In short, the

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[237] *See* United States v. Olinger, *supra* note 221; United States v. Mamaluy, *supra* note 221.

[238] United States v. Judd, 11 C.M.A. 164, 170, 28 C.M.R. 388, 394 (1966) (Ferguson, J., concurring) (emphasis in original).

[239] Gregg v. Georgia, 428 U.S. at 199 (opinion of Stewart, Powell, and Stevens, J.J.).

[240] *See* U.C.M.J. art 66(c).

[241] United States v. Matthews, 13 M.J. at 528; *see* H. R. Rep. No. 491, 81st Cong., 2d Sess., *reprinted in* (1950) U.S. Code Cong. Serv. 2222, 2254; *see also* United States v. Judd, 11 C.M.A. at 169-70, 28 C.M.R. at 393-94 (Ferguson, J., concurring).

[242] United States v. Matthews, 13 M.J. at 532-33.

[243] U.C.M.J. art 67(d); *see* United States v. Olinger, *supra* note 221.

[244] *See* Oklahoma v. United States Civil Serv. Comm'n, *supra* note 201.

[245] United States v. Christopher, 13 C.M.A. at 236, 32 C.M.R. at 236.

[246] *Cf.* United States v. Johnson, 323 U.S. 273 (1944) (ambiguous statute should be construed consistently with constitutional policies).

provisions in the U.C.M.J. regarding appellate review of military capital sentences fully comport with the Eighth Amendment.

III. ADDITIONAL PROTECTIONS PROVIDED BY THE MILITARY JUSTICE SYSTEM

The Supreme Court has never required the presence of any particular feature or procedure for a capital sentencing system to pass constitutional muster. Rather, the Court has considered whether the capital sentencing system under review achieves the underlying goal of *Furman* and its progeny:

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.[247]

In determining whether that goal is achieved, the Supreme Court has consistently evaluated "capital sentencing system[s], when viewed in their *entirety*," [248] and as applied.[249] Where "the *system* serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, the system does not violate the Constitution." [250]

In addressing the constitutionality of the various capital sentencing systems it has reviewed, the Supreme Court has frequently assessed the results achieved by each component of those systems. As noted previously, as long as the sentencing authority is free to give independent weight to all relevant evidence in extenuation and mitigation,[251] it does not matter whether the vehicle for the presentation of such evidence is a broad appellate interpretation of a facially restrictive statutory sentencing question,[252] an illustrative list of enumerated mitigating circumstances,[253] or an open-ended statutory provision which provides no illustrative listing of mitigating circumstances.[254] Similarly, as long as the sentencing body is given adequate guidance regarding the aggravating character of an accused's crime, it does not matter whether the vehicle

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[247] Gregg v. Georgia, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, J.J.).

[248] Proffitt v. Florida, 428 U.S. at 254 n.11 (opinion of Stewart, Powell, and Stevens, J.J.) (emphasis supplied); *accord* Gregg v. Georgia, 428 U.S. at 201 n.51 (opinion of Stewart, Powell, and Stevens, J.J.)).

[249] Godfrey v. Georgia, *supra* note 41.

[250] Jurek v. Texas, 428 U.S. at 276 (opinion of Stewart, Powell, and Stevens, J.J.) (emphasis supplied).

[251] Eddings v. Oklahoma, *supra* note 15; and Lockett v. Ohio, *supra* note 15.

[252] Jurek v. Texas, 428 U.S. at 271-74 (opinion of Stewart, Powell, and Stevens, J.J.).

[253] Proffitt v. Florida, 428 U.S. at 257-58 (opinion of Stewart, Powell, and Stevens, J.J.).

[254] Gregg v. Georgia, 428 U.S. at 197, 206 (opinion of Stewart, Powell, and Stevens, J.J.).

for such guidance is a listing of statutory aggravating circumstances as applied,[255] or the statutory narrowing of capital offenses as applied.[256] Likewise, as long as the aggravating basis for denominating a crime as being capital is sufficiently narrowed upon a principled basis, it does not matter whether the basis for such narrowing concerns the status of the offender or the victim, the circumstances of the crime, or the manner in which the crime was accomplished.[257] Finally, as long as the post-trial appellate processes help reduce the risk of arbitrary or capricious capital sentencing to a tolerable level, it does not matter what appellate procedures are utilized to achieve that result.[258] In short, where each stage of the capital sentencing system satisfies *Furman*, the system as a whole is constitutional regardless of the specific procedures utilized at each stage.

The Supreme Court's concern with results, however, extends beyond a segmented analysis of the outcome achieved by each component of a capital sentencing system. In assessing the constitutionality of various capital sentencing procedures it has reviewed, the Supreme Court has consistently evaluated the system *in toto*, as shaped by all of its component procedures and stages.[259] Where post-trial procedures serve to minimize the risk that infirmities which occurred at the trial stage will go unchecked on appeal, the systemic result will be upheld.[260] Conversely, where trial-stage infirmities are in "no way cured" [261] by the post-trial procedures used, the systemic result will be disallowed.[262] The Supreme Court has even actively considered whether the "mistrial 'option' is an adequate substitute for proper instructions on lesser included offenses" in a capital case.[263] Consequently, where the system as a whole satisfies *Furman*, it is constitutional regardless of any deficiency at a particular stage. Even assuming that the military capital sentencing procedures discussed above [264] were constitutionally deficient, the unprecedented

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[255] Godfrey v. Georgia, *supra* note 41; Proffitt v. Florida, *supra* note 19; Gregg v. Georgia, *supra* note 3; Jurek v. Texas, *supra* note 20.

[256] Jurek v. Texas, *supra* note 20.

[257] *See generally* Jurek v. Texas, *supra* note 20; Proffitt v. Florida, *supra* note 19; Gregg v. Georgia, *supra* note 3.

[258] *See supra* note 257.

[259] *See supra* note 257.

[260] Proffitt v. Florida, 428 U.S. at 252-53 (opinion of Stewart, Powell, and Stevens, J.J.).

[261] Godfrey v. Georgia, 446 U.S. at 429 (opinion of Stewart, J.).

[262] *See* Beck v. Alabama, 447 U.S. at 645-46.

[263] *Id.* at 644.

[264] Specifically, the authors assume, for this portion of the article, that military capital sentencing procedures regarding the presentation of matters in extenuation and mitigation (notes 15-27, *supra*, and accompanying text), guidance and narrowing with regard to aggravation (notes 28-178, *supra*, and accompanying text), and appellate review (notes 179-246, *supra*, and accompanying text), are constitutionally deficient.

additional procedural protections afforded to a military accused are more than adequate to guarantee systemic compliance with *Furman*.

A. PRETRIAL PROTECTIONS

The Supreme Court has without exception held that pretrial discretion, no matter how arbitrary or capricious, is beyond the pale of *Furman* and the Eighth Amendment.[265] Logically, a capital sentencing system which runs the risk of an unfettered and even irrational exercise of discretion at the pretrial stage—*e.g.*, every civilian system which has come before the Supreme Court—requires narrowly drawn trial and post-trial procedures in order to produce a systemic result which satisfies the purpose of *Furman*. Conversely, where a capital sentencing system channels pretrial discretion in a rational manner, the need for subsequent procedural protections to achieve the same result is arguably diminished. The unprecedented pretrial procedures accorded a military accused in a capital case rationally channel pretrial discretion, thus diminishing the systemic need for other procedural protections and curing any assumed infirmity with respect to the trial or post-trial procedures required by *Furman*.

Prior to trial, a civilian prosecutor has virtually unfettered discretion in selecting those persons to be charged with a capital offense.[266] In the military, on the other hand, the convening authority has the benefit of recommendations and indorsements from multiple levels within an accused's chain of command, a complete investigation of the charges by an impartial investigating officer acting in a quasi-judicial capacity,[267] and legal guidance from the staff judge advocate before rendering his referral decision. These written advisements serve to foster an informed referral.

Moreover, although a civilian defendant in the federal system and in some states has the right to an indictment by a grand jury,[268] there is no corresponding right to be present during the proceedings or to provide exculpatory or explanatory evidence that would focus the grand jury's attention on the particularized circumstances of the alleged crime.[269] In civilian judicial systems, the charging process (which constitutes the

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[265] *See, e.g.*, Jurek v. Texas, 428 U.S. at 275 (opinion of Stewart, Powell, and Stevens, J.J.); Proffitt v. Florida, 428 U.S. at 254 (opinion of Stewart, Powell, and Stevens, J.J.); Gregg v. Georgia, 428 U.S. at 199 (opinion of Stewart, Powell, and Stevens, J.J.).

[266] *See* Jurek v. Texas, 428 U.S. at 274 (opinion of Stewart, Powell, and Stevens, J.J.); Proffitt v. Florida, 428 U.S. at 254 (opinion of Stewart, Powell, and Stevens, J.J.); Gregg v. Georgia, 428 U.S. at 199 (opinion of Stewart, Powell, and Stevens, J.J.).

[267] *See* United States v. Payne, 3 M.J. 354 (C.M.A. 1977).

[268] U.S. Const. amend. VI.

[269] *See, e.g.*, United States v. Ciambrone, 601 F.2d 616, 623 (2nd Cir. 1979).

first step in determining whether the defendant will be subject to capital punishment) is typically unresponsive to factors which minimize the risk of arbitrariness.

In contrast, the practice in the military insures that before a case is referred to trial by a general court-martial as a capital offense, a formal pretrial investigation must be conducted by an impartial and mature officer.[270] While a grand jury proceeding is conducted by a civilian prosecutor, the Article 32 investigating officer "is required to conduct a thorough and impartial investigation" and "impartially weigh all available facts in arriving at his conclusions." [271] Moreover, unlike the procedure in a civilian grand jury, a military accused has the right to be present at the Article 32 investigation, to cross-examine the witnesses against him, and to present any matters in his behalf, either in defense, extenuation, or mitigation.[272]

If the investigating officer recommends trial by general court-martial, he must submit, to the authority who appointed him, a formal report summarizing the testimony for both sides, explaining his decision, and supporting his conclusions and recommendations.[273] If the appointing authority similarly recommends trial by a general court-martial, a second review of all the evidence is conducted by the staff judge advocate, who must prepare a written pretrial advice to the general court-martial convening authority. This advice contains a recommendation of the proper action to be taken by the convening authority based upon a "discussion of the circumstances and available evidence, [and] significant mitigating and extenuating factors." [274] These procedures, as noted by the Court of Military Appeals, protect "against precipitate or ill-considered action." [275]

The general court-martial convening authority must thereafter decide,[276] based upon all the evidence presented by both sides during the investigation (as well as the recommendations of the investigating officer, the staff judge advocate, and all subordinate commanders), whether he

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[270] U.C.M.J. art 32.

[271] Paragraph 34, Manual.

[272] U.C.M.J. art 32(b); paragraph 34, Manual. In this way, the concerns identified in Eddings v. Oklahoma, *supra* note 15; Bell v. Ohio, *supra* note 15; and Lockett v. Ohio, *supra* note 15, find meaningful expression in the military capital sentencing system even before the initial Article 39(a), session is called to order.

[273] Paragraph 34c, Manual.

[274] Paragraph 35c, Manual; *accord* U.C.M.J. art 34.

[275] United States v. Smith, 13 C.M.A. 553, 557, 33 C.M.R. 85, 89 (1963).

[276] This is not to say, of course, that the function of the general court-martial convening authority at this stage of the proceedings is akin to that of a military judge at trial. Rather, his actions are in the nature of a restrained, good-faith exercise of prosecutorial discretion. United States v. Hardin, 7 M.J. 399, 404 (CMA 1979).

should refer the accused's case to trial by general court-martial as either capital or non-capital, or whether he should instead "authorize the trial of . . . [a] capital offense[] by inferior courts-martial." [277] Again, unlike its civilian counterpart (which utilizes the indictment procedure), the referral process in the military assures that the authority responsible for making the referral decision is apprised of all the circumstances relevant to that referral, including defense evidence and evidence in extenuation and mitigation, before he renders a decision. All of these pretrial protections diminish the need for stringent trial and post-trial protective procedures.

B. TRIAL PROTECTIONS

In addition to the unprecedented pretrial protections afforded a military accused, the military capital sentencing system features additional trial-phase protections which serve to satisfy the purpose of *Furman* and which have no counterpart in civilian jurisdictions. First and perhaps most important among these is the nature of a military jury. While by no means dispositive, justices of the Supreme Court have not hesitated to recognize that systemic consistency of capital sentencing may be enhanced in relation to the experience and knowledge possessed by the sentencing authority.[278] In this regard, members of a court-martial panel, unlike civilian jurors, are personally selected by the convening authority based on specified qualifications; *i.e.*, age, education, training, length of service, and judicial temperament.[279] These members are drawn exclusively from the accused's own environment and possess a specialized knowledge of his profession.[280] Also unlike civilian jurors, military court members are permitted to question witnesses.[281] These compositional and functional differences, which have won express approval by the Supreme Court,[282] would no doubt weigh heavily upon any assessment of the military capital sentencing system's compliance with *Furman*.[283]

Other trial-phase procedures embodied in the military capital sentencing system, many of which are unknown to civilian systems, also guarantee satisfaction with *Furman*. For example, a military accused in a capi-

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[277] Paragraph 35*a*, Manual. The option of tial by an inferior court-martial does not exist with respect to the offenses of premeditated murder (U.C.M.J. art 118(1)) and spying in time of war (U.C.M.J. art 106). *See* paragraph 15*a*(3), Manual.

[278] *See* Gregg v. Georgia, 428 U.S. at 190 (opinion of Stewart, Powell, and Stevens, J.J.); *see also* Beck v. Alabama, 447 U.S. at 645.

[279] U.C.M.J. art 25(a)(2).

[280] United States v. Guilford, 8 M.J. 598 (A.C.M.R. 1979), *pet. denied*, 8 M.J. 242 (C.M.A. 1980).

[281] Rule 614, M.R.E.

[282] O'Callahan v. Parker, 395 U.S. 258 (1969).

[283] *See* Schick v. Reed, *supra* note 85.

tal case must be tried by a panel of members rather than by a judge sitting alone.[284] Also, a military accused may not plead guilty to a capital offense; consequently, all the relevant facts must be presented to the court members and must be established to their satisfaction beyond a reasonable doubt before a guilty verdict can be returned.[285] At his bifurcated trial,[286] a military accused may remain silent on the merits and nonetheless make a sworn or unsworn statement on sentencing.[287] Finally, even if a verdict of guilty to a capital offense is returned by the military panel, a sentence to death cannot be adjudged absent a unanimous concurrence by the court members.[288]

Additionally, the prosecution is more limited in introducing aggravating evidence to the sentencing authority in military capital cases than in civilian capital cases.[289] In the military system, the prosecution may utilize only aggravating evidence introduced during findings, additional aggravating evidence regarding the circumstances of the offense not introduced prior to findings, evidence of prior criminal convictions, and personnel records reflecting the past military conduct and performance of an accused.[290] In civilian systems, virtually any relevant evidence may be introduced during sentencing.[291] The military system, therefore, channels the sentencing authority's discretion and thereby promotes uniformity to a greater extent than did pre-*Furman*, civilian capital sentencing procedures. As the military system permits the sentencing authority to consider a much narrower range of aggravating evidence during sentencing, there is substantially less need in the military for standards which guide the sentencing body's consideration of aggravating evidence.

C. *POST-TRIAL REVIEW BY THE CONVENING AUTHORITY*

As noted earlier, the Supreme Court has examined post-trial procedures not only to determine if they properly apply statutory criteria or procedures on appeal but also to see if any trial-stage infirmities identified in its review have been "cured" through appellate action. In this regard, the initial mandatory post-trial review by the convening authority,

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[284] Paragraph 53, Manual.
[285] U.C.M.J. art 45(b); paragraph 70*a*, Manual.
[286] Paragraph 75*b*, Manual.
[287] Paragraph 75*b*(2), Manual; *see generally* McGautha v. California, *supra* note 86.
[288] U.C.M.J. art 52(b)(1).
[289] *See* Smith v. United States, 551 F.2d 1193 (10th Cir.), *cert. denied*, 434 U.S. 830 (1977); United States v. Boles, 11 M.J. 195, 198 n.5 (C.M.A. 1981).
[290] *See* 25; paragraph 75, Manual.
[291] *See, e.g.*, Ga. Code Ann. § 27-2503 (1978); Tex. Code Crim. Proc., art. 37.071(a) (Supp. 1980); *see also* Fed. R. Crim. P. 32.

unprecedented in civilian jurisdictions, goes far to insure systemic compliance with the requirements of *Furman*, even in the presence of any assumed trial-stage deficiency.

Specifically, the staff judge advocate must submit a written post-trial review to the convening authority with respect to all general courts-martial convictions.[292] This review must contain: a summary of the evidence; the staff judge advocate's opinion as to its legal sufficiency; a recommendation as to the action to be taken with respect to findings and sentence; and, specific reasons for that recommendation. The review may also contain extra-record matters to assist the convening authority in his determination of an appropriate action on the sentence.[293] A military accused [294] has the right to submit a rebuttal to the post-trial review for the convening authority's mandatory consideration.[295] On the basis of this review, the convening authority ultimately approves only "such findings of guilty, and sentence . . . as he finds correct in law and fact." [296] The convening authority may disapprove legal sentences by reducing the type or quantity of punishment when, in his unfettered judgment, the adjudged sentence appears unnecessarily severe in light of "the possibility of rehabilitation as well as the possible deterrent effect." [297]

In these respects "the Uniform Code accords an accused an advantage that has no parallel in the civilian court." [298] The convening authority's action not only assures that the adjudged penalty is proportional to that warranted by the offense and the offender but also provides significant protection against the approval of a penalty which is atypically severe in comparison to other sentences for like offenses imposed within that same jurisdiction. This unparalleled initial post-trial review minimizes the risk that the military capital sentencing system will fail to satisfy the proportionality and uniformity requirements found lacking in civilian jurisdictions by the Supreme Court in *Furman*.

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[292] Also written to a military accused is the submission of a written clemency petition to persuade the sentencing authority to recommend clemency to the convening authority. Paragraph 77*a*, Manual. As no rules of evidence apply with respect to this petition, "inadmissible but favorable information such as sentences received by co-conspirators in separate trials or the results of polygraph examinations could be brought to the court's attention." English, *supra* note 6, at 563.

[293] U.C.M.J. art 61; paragraph 85, Manual.

[294] United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

[295] As an accused's written clemency petition becomes part of the trial record, it also is reviewed by the convening authority at this stage. *See* English, *supra* note 6. Defense counsel may submit an Article 38(c), U.C.M.J. brief to the convening authority containing "such matters as he feels should be considered in behalf of the accused." U.C.M.J. art 38. This brief is made part of the trial record. *See* English, *supra* note 6.

[296] U.C.M.J. art 64.

[297] Paragraph 80, Manual.

D. FINAL APPROVAL BY THE PRESIDENT

No sentence of death may be executed "until approved by the President." [299] Unlike most state jurisdictions where the defendant must seek executive clemency (and the executive has discretion to refuse to consider his petition), when the Court of Military Appeals affirms a conviction and death sentence, "the record of trial, the decision of the Court of Military Review, the recommendations of The Judge Advocate General, and the decision of the Court of Military Appeals *shall* be transmitted to the Secretary concerned for the action of the President." [300] The President must either approve the sentence as adjudged "or such commuted form of the sentence as he sees fit." [301]

Thus, as a final assurance that the adjudged sentence is neither arbitrary nor disproportionate,[302] especially with respect to other sentences imposed throughout all the armed services for similar offenses, the authority who exercises clemency (the President) must expressly and affirmatively approve a capital penalty. In the military, final executive approval cannot occur by the passive operation of law, and the reluctance to expressly disapprove a death sentence cannot constitute approval of the sentence. Rather, executive approval must be clear and unequivocal. This final procedural protection insures ultimate systemic compliance with *Furman*.[303]

E. CONCLUSION

The additional safeguards and procedures embodied in the military capital sentencing system (the unprecedented pretrial procedures, the unparalleled additional trial-phase procedures, the mandatory initial post-trial review by the convening authority, and the mandatory final approval by the President), compensate for any possible constitutional deficiency with respect to traditional capital sentencing procedures. Viewing the operation of these procedures in their entirety, the risk of "wholly arbitrary or capricious action" has been sufficiently minimized by the military capital sentencing system.[304] The military system, in its entirety, satisfies the requirements of *Furman*.

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[299] United States v. Griffin, 8 M.J. 66, 69 (C.M.A. 1979) (opinion of Cook, J.).

[300] U.C.M.J. art 71(a).

[301] Paragraph 101, Manual (emphasis supplied).

[302] U.C.M.J. art 71(a); *see* Schick v. Reed, *supra* note 85.

[303] *See* Roberts (Stanislaus) v. Louisiana, 428 U.S. at 349-50 (White, J., dissenting).

[304] Indeed, while the President has the unfettered ability to approve any part of the court-martial sentence "as he sees fit," the Georgia system favorably reviewed in Gregg v. Georgia, *supra* note 3, provides life imprisonment as the only alternative to death, and requires affirmative executive action to reduce or halt the execution of a capital sentence.

[304] Gregg v. Georgia, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, J.J.).

IV. UNIFORMITY OF RESULTS

The decisions in *Furman* and its progeny sought to insure that each jurisdiction would adjudge the death penalty "with reasonable consistency, or not at all".[305] Some commentators, relying upon a prolonged absence of the imposition of the death penalty in the military, contend that the military capital sentencing system is unconstitutional because the death penalty allegedly has been executed rarely and inconsistently.[306] Such contentions are insufficient to support the burden of proving that the military's presumptively constitutional capital sentencing system is unconstitutional.

First, any reliance upon military cases in which the death penalty was not adjudged for either premeditated murder or felony murder is improper, because the reported decisions of those cases do not reveal how many of them were referred non-capital.[307] To the extent that the convening authority in exercising pretrial discretion [308] referred these cases as non-capital, the military capital sentencing system suffers no constitutional infirmity.[309] As such an attack upon the military capital sentencing system would not exclude the possibility that charges in some cases were referred as noncapital, reliance on these or similar cases is insufficient to sustain the burden of proving the unconstitutionality of a military death penalty on the basis of an alleged lack of uniformity.[310]

Second, the sparing imposition of the death penalty in the military manifests that military court members and reviewing authorities "are

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[305] Eddings v. Oklahoma, 102 S. Ct. at 875. Beginning with *Furman*, the Supreme Court has enunciated constitutional guidelines for the purpose of achieving more uniform results from capital sentencing systems. Gregg v. Georgia, 428 U.S. at 188 n.36 (opinion of Stewart, Powell, and Stevens, J.J.); *see* Furman v. Georgia, 408 at 257 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 398-99 (Burger, C.J., dissenting). While a capital sentencing system must produce uniform results regardless of how exemplary its procedures may be "[o]n their face" (Gregg v. Georgia, 428 U.S. at 198 (opinion of Stewart, Powell, and Stevens, J.J.); *see also* Godfrey v. Georgia, *supra* note 41)), the Eighth Amendment does not require appellate courts to conduct a uniformity analysis in every case. *See* notes 218-239, *supra*, and accompanying text.

[306] *See, e.g.*, Russelberg, *supra* note 6.

[307] *See, e.g.*, United States v. Mitchell, 2 M.J. 1020 (A.C.M.R. 1976), *pet. denied*, 3 M.J. 105 (C.M.A. 1977); United States v. Talavera, 2 M.J. 799 (A.C.M.R. 1976), *affirmed*, 8 M.J. 14 (C.M.A. 1979); United States v. Noreen, 48 C.M.R. 228 (A.C.M.R. 1973), *affirmed*, 23 C.M.A. 212, 49 C.M.R. 1 (1974); United States v. Calley, 46 C.M.R. 1131 (A.C.M.R.), *affirmed*, 22 C.M.A. 534, 48 C.M.R. 19 (1973); United States v. Thomas, 46 C.M.R. 705 (A.C.M.R. 1972), *pet. denied*, 46 C.M.R. 1324 (C.M.A. 1973); United States v. Thomas, 38 C.M.R. 655 (A.B.R. 1968).

[308] *See* U.C.M.J. art 34(a); paragraph 33*h*, Manual.

[309] Gregg v. Georgia, 428 U.S. at 199 (opinion of Stewart, Powell, and Stevens, J.J.); *accord* Jurek v. Texas, 428 U.S. at 274 (opinion of Stewart, Powell, and Stevens, J.J.); Proffitt v. Florida, 428 U.S. at 254 (opinion of Stewart, Powell, and Stevens, J.J.).

[310] *See* Fullilove v. Klutznick, *supra* note 236; Fleming v. Nestor, *supra* note 236.

especially cautious in imposing the death penalty, and reserve that punishment for" only the most severe capital cases.[311] The sparing imposition of the death penalty in the military also indicates that military sentencing authorities and reviewing authorities have tempered their sentencing decisions with a due concern for extenuating and mitigating evidence regarding the character of the accused and the circumstances of the offense. In this respect, the military capital sentencing system comports fully with constitutional requirements.[312] Indeed, there was substantial extenuating and mitigating evidence presented in illustrative murder cases where death was not imposed.[313] As the Supreme Court has stated, "[n]othing in any of our cases [regarding the Eighth

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[311] Enmund v. Florida, 102 S. Ct. at 3388 (O'Connor, J., dissenting); *see* Gregg v. Georgia, 428 U.S. at 181-82 (opinion of Stewart, Powell, and Stevens, J.J.). Indeed, imposition of the death penalty in the military satisfies the Eighth Amendment requirement of "reasonable consistency" (Eddings v. Oklahoma, 102 S. Ct. at 875). *See, e.g.*, United States v. Matthews, *supra* note 5 (brutal rape-murder where the victim suffered extensive physical pain prior to death); United States v. Bennett, 7 C.M.A. 97, 21 C.M.R. 223 (1956) (brutal rape and attempted premeditated murder); United States v. Thomas, 6 C.M.A. 92, 19 C.M.R. 218 (1955) (four specifications of premeditated murder); United States v. Moore, 13 C.M.R. 311 (A.B.R. 1953), *affirmed*, 4 C.M.A. 482, 16 C.M.R. 56 (1956) (premeditated murder and assault with intent to commit robbery); United States v. Edwards, 11 C.M.R. 350 (A.B.R. 1953), *supp. dec.*, 14 C.M.R. 292 (A.B.R., *affirmed*, 4 C.M.A. 299, 15 C.M.R. 299 (1954) (premeditated murder); United States v. Ransom, 12 C.M.R. 480 (A.B.R. 1953), *affirmed*, 4 C.M.A. 195, 15 C.M.R. 195 (1954) (premeditated murder, rape, robbery, aggravated assault, lifting up a weapon to his superior commissioned officer); United States v. O'Brien, 9 C.M.R. 201 (A.B.R. 1952), *affirmed*, 3 C.M.A. 105, 11 C.M.R. 105 (1953) (premeditated murder); United States v. Riggins and Suttles and Beverly, 8 C.M.R. 496 (A.B.R. 1952), *affirmed*, 2 C.M.A. 451, 9 C.M.R. 81 (1953) (premeditated murder and two robbery specifications).

[312] Eddings v. Oklahoma, *supra* note 15; Lockett v. Ohio, *supra* note 15; Roberts (Stanislaus) v. Louisiana, *supra* note 20; Woodson v. North Carolina, *supra* note 20; *cf.* Ga. Code Ann. § 27-2537 (Supp. 1975) (Georgia Supreme Court must consider matters relating to the offender in comparing adjudged death sentence with penalty adjudged in "similar" cases).

[313] *See, e.g.*, United States v. Mitchell, *supra* note 307 (substantial evidence regarding the accused's prior outstanding military record); United States v. Noreen, *supra* note 307 (accused suffered from character and behavior disorder and was intoxicated at the time of the offenses); United States v. Smith, 47 C.M.R. 952 (A.C.M.R. 1973) (wartime murder by accused who shot himself after the offense and otherwise presented evidence that he was not sane); United States v. Crider, 45 C.M.R. 815 (N.C.M.R. 1972) (wartime murders by accused who was mentally and physically exhausted at time of offense from extended combat); United States v. Blankenship, 30 C.M.R. 881 (A.F.B.R. 1955) (premeditated murder committed by intoxicated accused who had been suffering from stress and who committed offense after victim argued with the accused). Moreover, cases such as United States v. Bumgarner, 43 C.M.R. 559 (A.C.M.R. 1970), for example, are not relevant to the instant analysis because the court-martial found the accused guilty of the non-capital offense of unpremeditated murder. *See* U.C.M.J. art 118(2). As the sentencing authority therefore did not decide whether to impose the death penalty, the fact that Bumgarner received a lenient sentence is not probative of whether the death penalty is adjudged arbitrarily in military capital cases.

Amendment] suggests that the decision to afford an individual defendant mercy violates the Constitution." [314]

Finally, the sparing imposition of the death penalty in the military is attributable in part to a tacit moratorium against its imposition. This moratorium began in approximately 1967 "while cases challenging the procedures for implementing the capital sentence [were] re-examined by" the Supreme Court.[315] This moratorium has likely affected both the willingness of convening authorities to refer cases as capital and of court members to adjudge a death penalty. During the period of uncertainty after the decision in *Furman*, "caution and deference required [lower federal courts passing on the constitutionality of the federal civilian death penalty [316]] to await the results of the Supreme Court's further consideration of capital punishment." [317] This same desire for further guidance from appellate authorities undoubtedly explains the reluctance of staff judge advocates to recommend that cases be referred as capital [318] and of military judges to permit cases to be tried as capital.[319]

In light of this moratorium and the procedural protections of the military capital sentencing system which comply with the guidelines set forth in *Furman* and its progeny, the affirmed death penalty in *United States v. Matthews* [320] is not violative of the Eighth Amendment solely because it is the first such sentence to be adjudged in a substantial period of time.[321] To conclude otherwise would require Congress to engage in

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[314] Gregg v. Georgia, 428 U.S. at 199 (opinion of Stewart, Powell, and Stevens, J.J.). A capital sentencing system which imposes the death penalty sparingly is not unconstitutional, if that sparing imposition stems from the sentencing authority's decision not to adjudge the death penalty in reliance on evidence in extenuation or mitigation. *See* Eddings v. Oklahoma, *supra* note 15; Lockett v. Ohio, *supra* note 15; *see also* Roberts (Stanislaus) v. Louisiana, *supra* note 20; Woodson v. North Carolina, *supra* note 20; Gregg v. Georgia, 428 U.S. at 199; *see generally* Radin, *supra* note 12, at 1150, 1180-81 (discussing "the *Furman-Lockett* paradox"). This creates a tension in the Supreme Court's death penalty decisions which makes effective appellate review for uniformity problematical. *Compare* Jurek v. Texas, *supra* note 20, *and* Proffitt v. Florida, *supra* note 19, *and* Gregg v. Georgia, *supra* note 3, *and* Furman v. Georgia, *supra* note 1, *with* Eddings v. Oklahoma, *supra* note 15, *and* Lockett v. Ohio, *supra* note 15.

[315] Furman v. Georgia, 408 U.S. at 435 n.18 (Powell, J., dissenting).

[316] *See* 18 U.S.C. § 1111 (1970)

[317] United States v. Kaiser, 545 F.2d at 472.

[318] *See* English, *supra* note 6, at 552 n.2.

[319] *See, e.g.*, United States v. Fountain, 2 M.J. 1202 (N.C.M.R. 1976); United States v. Day, 1 M.J. 1167 (C.G.C.M.R. 1975); *see also* United States v. McReynolds, *supra* note 5 (military judge accepted plea of guilty to rape after determining that it was a non-capital offense).

[320] United States v. Matthews, *supra* note 5.

[321] *Cf.* Eddings v. State, 616 P.2d 1159, 1170-71 (Okla. 1980), *reversed on other grounds sub nom.* Eddings v. Oklahoma, *supra* note 15; State v. Shaw, 255 S.E.2d 799, 807 (S.C. 1979) (first death sentence adjudged under newly enacted state capital sentencing systems not unconstitutional solely because there are no other capital cases under the new system with which to compare the sentence).

the empty ritual of re-enacting the same codal provisions to have a death penalty available in the military. The Supreme Court's decisions with respect to the Eighth Amendment should not be interpreted to compel such an absurd result.[322] For these reasons, a capital accused could not sustain his burden of proving that the military capital sentencing system is unconstitutional [323] by contending that the system does not produce uniform capital sentences.

V. CONCLUSION

The validity of the arguments advanced in this article will soon be tested before the Court of Military Appeals in *United States v. Matthews*.[324] Regardless of the result attained there, the ultimate resolution of the issues likely awaits prolonged appellate litigation, potentially leading to review before the Supreme Court. Perhaps just as likely is that this fluid area of constitutional law will continue to develop and change through judicial decisions in other jurisdictions during the course of that review. Congressional and presidential action may also be interposed through amendments to the Uniform Code of Military Justice or changes to the Manual for Courts-Martial. The outcome of any one case, however, will not affect the undeniable trend within civilian and military society toward the increased use of the ultimate sanction.[325] Capital punishment, unique in its moral, philosophical, and legal implications, deserves the most careful consideration in all quarters before its exercise is either assailed as being immoral and useless or praised as being righteous and necessary.

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[322] *Cf.* United States v. Turkette, 492 U.S. 576 (1981) (statute should not be interpreted in a manner which produces absurd results); *see generally* M. Pfau & E. Milhizer, *Effective Date of Forfeitures Adjudged in Capital Cases: 'Receiving Pay on Death Row'*, The Army Lawyer, Feb. 1983, at 27 (criticizing judicial construction of statute which delays application of forfeitures until after capital accused's death sentence is approved by President).

[323] *See* Fullilove v. Klutznick, *supra* note 236; Fleming v. Nestor, *supra* note 236.

[324] United States v. Matthews, *supra* note 5.

[325] Since the death penalty was adjudged at Matthews' court-martial on 3 July 1979, six other military accuseds have received capital sentences: United States v. Armando Rojas (Marine Corps, sentence adjudged 30 January 1981); United States v. Leon B. Redmond (Army, sentenced adjudged 5 March 1981); United States v. Leman L. Hutchinson, Jr. (Marine Corps, sentence adjudged 22 June 1981); United States v. Robert M. Gay (Air Force, sentence adjudged 15 December 1981); United States v. Joseph N. Brown (Army, sentence adjudged 1 July 1982); after 1982 in United States v. Randolph Artis (Army, sentence adjudged 22 February 1983). *See* Administrative Control Roster, maintained in the Office of the Clerk of the United States Army Court of Military Review, 5611 Columbia Pike, Falls Church, Virginia, 22041. Prior to Matthews' trial, the last military death sentence was adjudged on 6 January 1965. United States v. Arthur Gilmer, Jr. (Army). Capital Punishment Chronology, maintained in the Office of the Clerk of the United States Army Court of Military Review 5611 Columbia Pike, Falls Church, Virginia, 22041.

THE CONSTITUTIONALITY OF THE U.C.M.J. DEATH PENALTY PROVISIONS *

by Major John J. Pavlick, Jr.**

I. INTRODUCTION

The death penalty, the ultimate sanction, has been the subject of much controversy and fascination in recent years. During the late 1960's an assault upon the constitutionality of the death penalty was launched by several groups led by the NAACP Legal Defense and Education Fund, Inc. and the American Civil Liberties Union. The zenith of their success was the 1972 Supreme Court decision of *Furman v. Georgia*,[1] which struck down the Georgia capital punishment statute as violative of the cruel and unusual prohibitions of the Eighth Amendment.[2] Since that time the Court's attempts at grappling with this area has been characterized by lack of unanimity in reasoning and uncertainty in direction. The *Furman* decision itself was of little usefulness as legal precedent, as it was a five to four *per curiam* decision with nine separate opinions; however, its practical effect was far reaching. *Furman* caused courts to strike down and legislatures to amend all except one of the capital punishment statutes in existence at the time of the decision.[3]

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[1] 408 U.S. 238 (1972) (per curiam).

[2] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. amend. VIII.

[3] Coker v. Georgia, 433 U.S. 584, 593-94 (1977). The one statute is the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1976) [hereinafter cited as U.C.M.J.].

Since *Furman*, the constitutionality of the capital punishment provisions of the Uniform Code of Military Justice (U.C.M.J.) had not been directly addressed on the merits by the Supreme Court [4] and was addressed by only one military appellate court [5] until the Army Court of Military Review decided *United States v. Matthews* [6] on March 17, 1982. The court in *Matthews* upheld the constitutionality of the death penalty under the U.C.M.J. for the offense of premeditated murder.[7] The case is currently before the United States Court of Military Appeals for mandatory review with a final decision expected later this year.[8]

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[4] Arguably the Supreme Court addressed the issue on one occasion. In Shick v. Reed, 419 U.S. 256 (1974), the Supreme Court considered the constitutionality challenge of the capital punishment provisions of the Uniform Code of Military Justice and the President's authority to commute the death sentence to life imprisonment without parole. The Court decided the challenge on the basis of the latter challenge, upholding the President's authority, never reaching the question of *Furman's* applicability to the military (although it appeared to imply that it did not). Interestingly, the dissent argued that *Furman* applied to the military and voided the U.C.M.J. capital punishment provisions. *Id.* at 271 (Marshall, J., dissenting).

The United States Court of Appeals for the District of Columbia in Shick v. Reed, 483 F.2d 1266, 1270 (D.C. Cir. 1973), reached the question of *Furman's* applicability, finding that it voided the U.C.M.J. provisions. The Fifth Circuit acknowledged the clear implication of the majority in *Schick* in United States v. Denson, 588 F.2d 1112, 1119 n.6 (5th Cir. 1979), but did not specifically address the issue.

[5] The Air Force Court of Military Review has ruled that the death penalty is grossly disproportionate and excessive punishment for the offense of rape of an adult female where the victim was not killed. United States v. McReynolds, 9 M.J. 881, 882 (A.F.C.M.R. 1980). The court based this conclusion upon the Eighth Amendment as interpreted in Coker v. Georgia, 433 U.S. 584 (1977) where the Supreme Court arrived at the same conclusion. The consideration of the death penalty in *McReynolds* was dicta as the court had already decided the issue on another basis.

The issue of *Furman's* effect has also been peripherally addressed in three other cases. In United States v. Day, 1 M.J. 1167 (C.G.C.M.R. 1975), the Coast Guard Court of Military Review considered a murder case where the trial judge had ruled that *Furman* applied to the military and acted to void the military death penalty provisions. The court considered other aspects of the case, but did not comment on the propriety of the trial judge's rulings. Similar factual situations were considered by the Navy Court of Military Review in United States v. Fountain, 2 M.J. 1202 (N.C.M.R. 1975) and United States v. Pittillo, NCM 73, 2547 (N.C.M.R. 19 Aug 1975) (unpublished). The issue in each of these cases was whether the accused lost any of his rights available at a noncapital court-martial because the case was referred as a capital case. The court found that in both cases the accused effectively waived his rights to these options after the trial judge ruled that *Furman* invalidated the military death penalty provisions.

[6] 13 M.J. 501 (A.C.M.R. 1982). Private First Class Wyatt F. Matthews was convicted of the rape and premeditated murder of a military dependant in Grafenwohr, Federal Republic of Germany, in violation of Articles 118 and 120, U.C.M.J. He was sentenced to death for the offense of premeditated murder. Although the death penalty was still technically authorized for the offense of rape, the convening authority was instructed in the post-trial review that the maximum sentence for rape was life imprisonment and the death sentence was approved only on the basis of the premeditated murder conviction.

[7] The Army Court of Military Review upheld the sentence to death and rejected several other defense allegations of error. The majority opinion, written by Judge Leroy Foreman, found the military provisions analagous to the Texas statute which was approved by the Supreme Court in Jurek v. Texas, 428 U.S. 262 (1976). *Id* at 526.

[8] Review of an approved death sentence is mandated by Article 71a, U.C.M.J. Oral argument before the U.S. Court of Military Appeals was held on 20 April 1983.

Should the court approve the findings and sentence, the President must decide whether the death sentence should be approved.[9] If the President approves the death sentence, this would undoubtedly lead to collateral attack in the federal courts and possibly a definitive decision from the Supreme Court.

This article will primarily examine the constitutionality of the military death penalty provisions under Article 118 for premeditated and felony murder [10] and briefly discuss the other death penalty provisions of U.C.M.J. for military-type offenses. The history of Supreme Court decisions in the death penalty area will be analyzed and then applied to the military provisions of the U.C.M.J. in the light of the requirements of military necessity. An analysis of these provisions will demonstrate that they comport with current Supreme Court requirements and are constitutional.

II. HISTORY AND ANALYSIS OF SUPREME COURT DECISIONS

Prior to *Furman*, the constitutionality of the death penalty either had been assumed or upheld in the decisions of the Supreme Court. Several cases decided within the four-year period prior to *Furman* were

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[9] U.C.M.J. art. 71(a).

[10] Article 118, defines four categories of murder. Two categories are punishable by death: (1) premeditated murder, and (2) murder while engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson. The latter is often referred to as felony murder although it is limited to the five named felonies. By operation of Article 77, U.C.M.J. and Paragraph 127c, Manual for Courts-Martial, 1969 (Rev. ed.) [hereinafter cited as M.C.M.], the penalty of death is extended to those who aid, counsel, command, procure, or cause the commission of one of these two types of murder.

The Supreme Court decision in Edmund v. Florida, 102 S. Ct. 3368 (1982), struck down the imposition of the death penalty for a person convicted of felony murder. The case involved a classic felony murder fact situation with the petitioner, Earl Edmund, driving his accomplices to the scene of a robbery and waiting in the car while they perpetrated the robbery, killing two people. Although there was some question as to Edmund's knowledge of what was to transpire and the extent of his participation in the murders, the Supreme Court found that his culpability did not justify the imposition of the death penalty. The majority opinion focused on the use of the classic doctrine of felony murder where the culpability of the actual murderer is vicariously attributed to the nonmurder accomplice. Citing Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court required that the imposition of the death penalty could be based only upon the culpability of the defendant not his accomplices. The Court found that the death penalty was disproportionate where the defendant did not kill, attempt to kill, or did not intend the death of the victim.

The *Edmund* decision does not appear to affect the imposition of the death penalty for a murder actually committed by a defendant during the commission of a felony. Thus the provisions of Article 118(4), U.C.M.J. remain unaffected by this ruling. The decision does appear to invalidate that portion of Paragraph 127c, M.C.M., dealing with the law of principles as it applies to murder committed during the commission of one of the felonies named in Article 118(4).

premised on the constitutionality of the death penalty [11]. Of these, *McGautha v. California*,[12] decided just one term before *Furman*, was the most important. McGautha alleged that the California capital sentencing statute violated the due process clause of the Fourteenth Amendment because the jury had absolute, unguided discretion to impose the death penalty. The Court rejected the argument based upon history, precedent, and a perceived inability to formulate standards that could cover all the conceivable circumstances that could confront a jury.[13]

The *McGautha* case evidenced a concerted effort on the part of various organizations, notably the NAACP Legal Defense and Education Fund and the American Civil Liberties Union, to abolish the death penalty. During the years prior to *Furman*, those groups, through their attacks on the death penalty, had created a veritable logjam on the death row across the country.[14] In *Furman* and in a number of companion cases, these groups argued various positions, including that the death penalty violated the cruel and unusual prohibition of the Eighth Amendment.[15] On June 29, 1972 the Supreme Court agreed that the particular statutes before it violated the Eighth Amendment prohibition. The cruel and unusual punishment clause had rarely been considered by the Supreme Court and never in the procedural sense used by the majority in *Furman*.[16]

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[11] McGautha v. California, 402 U.S. 183 (1971) (untrammeled discretion by the jury to sentence a defendant to death or some lesser punishment is not violative of the due process requirements of the Constitution); Boykin v. Alabama, 395 U.S. 238 (1969) (first time the Supreme Court was faced with the argument that the death penalty was cruel and unusual punishment violating the Eighth Amendment; reversed on guilty plea issue); Witherspoon v. Illinois, 391 U.S. 510 (1968) (assumed constitutionality of death penalty but found it unconstitutional to exclude jurors who expressed doubts about imposing the death penalty); United States v. Jackson, 390 U.S. 570 (1968) (unconstitutional for a statute to allow a defendant to exercise his right to a jury trial only by subjecting himself to the possible penalty of death.

[12] 402 U.S. 183 (1971).

[13] *Id.* at 196.

[14] *See* Note, *Furman to Gregg: The Judicial and Legislative History*, 22 How. L.J. 53, 71 (1979).

[15] The death penalty was also attacked as violating equal protection of the law in violation of the Fifth and Fourteenth Amendments and the due process clause of the Fourteenth Amendment. 33 L.Ed.2d at 930 (1972).

[16] The reasons for this relative inactivity seem to center on the vagueness of the essential terms and the resultant difficulty in applying these terms to any given situation. Additionally, it was not until Robinson v. California, 370 U.S. 660 (1962), that the Supreme Court clearly applied the Eighth Amendment to the states.

Ironically, one of the primary Eighth Amendment cases relied upon by the majority in *Furman*, Trop v. Dulles, 356 U.S. 86 (1958), specifically rejected the proposition that the death penalty violated the constitutional prohibition against cruel and unusual punishment.

A. THE FURMAN DECISION

The *per curiam* decision in *Furman* is a judicial nightmare of nine separate opinions, and the specifics of the opinions are of limited practical and precedential value. Five justices found that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." [17] A brief analysis of the separate opinions supporting this position is essential in understanding the starting position in charting the Court's reasoning concerning capital punishment.

Justices Brennan and Marshall may be considered together, as they alone reached the core question of whether the death penalty was unconstitutional in all cases. Both justices, though for different reasons, found that the death penalty was *per se* unconstitutional. Justice Brennan found that the meaning of the Eighth Amendment prohibition was not static or limited to those punishments prohibited when the Constitution was established, but drew its "meaning from the evolving standards of decency that mark the progress of a maturing society." [18] He found that the death penalty did not comport with human dignity, that modern society did not find it acceptable, and that it could not be shown to further any penal purpose that could not be served as efficiently by less severe punishments.[19] For these reasons he viewed the death penalty as cruel and unusual under all circumstances. Justice Marshall, after a detailed review of the history of capital punishment and of the cruel and unusual punishment prohibition of the Eighth Amendment, based his decision on the premise that the death penalty was excessive and morally unacceptable to the people of the United States.[20] These two justices have consistently followed their initial positions and have predictably concurred in the result of every case which struck down a capital punishment statute and dissented in those in which one was upheld.[21] Because of this consistency and the Court's later holding that the death penalty was not *per se* unconstitutional, the opinions of the other three justices who formed the majority are critical.

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[17] *Furman*, 408 U.S. at 239-40.

[18] *Id.* at 269-70 (Brennan, J., concurring) *citing* Trop v. Dulles, 356 U.S. 86, 100-101 (1958).

[19] *Id.* at 297-302.

[20] *Id.* at 258-60 (Marshall, J., concurring).

[21] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting), *id.* at 231 (Marshall, J., dissenting); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (Brennan, J., concurring in the judgment) (Marshall, J., concurring in the judgment); Coker v. Georgia, 433 U.S. 584, 600 (1977) (Brennan, J., concurring in the judgment), *id.* (Marshall, J., concurring in the judgment); Lockett v. Ohio, 438 U.S. 586, 619 (1978) (Marshall, J., concurring in the judgment). Justice Brennan took no part in the consideration or decision of *Lockett*.

Justice Douglas focused his analysis on the discriminatory application of the death penalty to racial and other minority groups. He found that a punishment is unusual and hence constitutionally defective when it "discriminates . . . by reason of race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." [22] Justice Douglas found that the unguided discretion given sentencing bodies in capital cases allowed the crucial decision of life or death to be based upon some such prejudice or other impermissible standards.[23] The core question of the *per se* unconstitutionality of the death penalty was not reached by his analysis.

Justice Stewart, relying on both the Eighth and Fourteenth Amendments, found that the infrequent imposition of the death penalty made it unusual in "the same way that being struck by lightning is cruel and unusual." [24] The death sentences for the petitioners before the Court were cruel and unusual because they were among a "capriciously selected random handful upon whom the sentence of death has in fact been imposed." [25]

Justice White focused upon the societal goals of the death penalty as a deterrent and found that because it was so infrequently imposed, it served little or no societal purpose.[26] Relying on the Eighth Amendment, he found that the imposition of the death penalty under the circumstances before the Court "would then be pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." [27] Justice White used his experience with capital cases to conclude that, under the procedures in the Georgia statute, "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." [28]

Justice White's and Justice Stewart's opinions are important because in later cases they consistently authored differing opinions for three-judge pluralities. Both justices refined their policies and shifted their emphasis in later cases. Justice Stewart shifted to focus on the procedural aspects of capital sentencing, and Justice White shifted to a great-

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[22] *Furman*, 408 U.S. at 242 (Douglas, J., concurring).
[23] *Id.* at 255-257 (Douglas, J., concurring).
[24] *Id.* at 309 (Stewart, J., concurring).
[25] *Id.* at 309-10.
[26] Both Justices Stewart and White base their position on the infrequent imposition of the death penalty. The basis for this assertion is somewhat suspect. Statistics indicating recent executions are dominated by the death penalty moratorium since 1967. While any statistic may be diluted by comparisons, 3,859 people were executed in the United States from 1930-1970. U.S. Dep't Justice National Prisoner Statistics, Bulletin No. 46, Capital Punishment 1930-1970.
[27] *Furman*, 408 U.S. at 312 (White, J., concurring).
[28] *Id.* at 313.

er deference to the desires of the legislatures in establishing criteria to decide who should die. It is impossible to derive an extensive rationale that would encompass the opinions of Justices Douglas, Stewart, and White. However, the evil that they perceived in the Georgia statute was the unbridled discretion of the jury in imposing a death sentence. This proposition is somewhat shocking, as the Court had held only one year before in *McGautha* that this type of jury discretion was unavoidable and did not violate the due process clause of the Fourteenth Amendment.[29]

Four justices dissented in the result, writing separate opinions.[30] All four generally decried the infringement upon the legislative perogatives by the Court's decision and argued that the decision ignored almost two hundred years of prior decisions. These opinions are not critical to the discussion of the Court's approach to subsequent capital cases because in future cases most of the justices proceeded from the practical result of the *Furman* decision's attack on jury discretion.

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[29] In *McGautha*, a majority of Chief Justice Burger and Justices Harlan, White, Stewart, and Blackmun held that "[i]n light of history, experience, and the present limitation of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." 402 U.S. at 207.

Chief Justice Burger recognized that *Furman* de facto overruled McGautha even though that case was decided in the context of the due process clause of the Fourteenth Amendment rather than the Eighth Amendment. 408 U.S. at 400. When the Eighth Amendment is applied procedurally as it was in *Furman*, it is applied essentially in the same manner as the due process clause. Considering this, the unavoidable question is why the Court would change its position. This question is focused on White and Stewart who voted with the majority in *McGautha*, but implicitly voted against jury discretion in *Furman*.

While the question is interesting, the answer is highly speculative. One theory is that both justices were overcome by the facts of the cases, particularly the cases decided with *Furman*. Additionally, the statistics presented by the NAACP Legal Defense and Education Fund, Inc., and the American Civil Liberties Union indicated a disparity in the ratio of black defendants to white defendants who were sentenced to die. In the deep South, blacks were much more likely to be sentenced to die than whites, especially for the crime of rape. While this might explain their votes in *Furman*, it does not explain their switch in positions in Gregg v. Georgia, 428 U.S. 153 (1976), where they upheld the Georgia capital sentencing statute and rejected the position that the death penalty is *per se* unconstitutional. For a good discussion of the views of Justices White and Stewart in the death penalty cases, *see* Palmer, *Two Perspectives on Structuring Discretion: Justices Stewart and White on the Death Penalty*, 70 J. Crim. L&C 194 (1979). Undoubtedly the reaction of the states and the United States Congress bore heavily on the opinions of Justices White and Stewart in *Gregg*, 428 U.S. at 179-80 (Stewart, J., plurality opinion) and Roberts v. Louisiana, 428 U.S. at 352-53 (White, J., dissenting). The justices were impressed with the new capital punishment statutes passed by 35 states and the United States Congress and a referendum subsequent to *Furman* held in California supporting a constitutional amendment that authorized capital punishment. *Coker*, 433 U.S. at 594.

[30] The dissenters were Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist.

B. THE INITIAL EFFECT OF FURMAN

The practical effect of *Furman* was twofold. First, the Court ostensibly invalidated, expressly or implicitly, all existing capital punishment schemes.[31] Second, the decision created confusion as to what constituted a constitutionally acceptable statute. This confusion, caused by the mode of the Court's decision and the lack of a majority or even a plurality opinion, spawned many scholarly inquiries, with some commentators arguing that such a constitutionality acceptable statute could not be formulated.[32] Despite this uncertainty, many states did enact new capital sentencing statutes in response to *Furman*. The statutes generally fell into two general categories—those that removed all discretion from the sentencing body by making the death penalty mandatory for certain offenses and those which attempted to limit discretion by prescribing standards to guide the sentencers in their decision. After *Furman*, 35 states revised their capital punishment statutes,[33] but the Supreme Court did not grant review of any of the new statutes until 1975. In that year, the Supreme Court granted review in five death penalty cases, and not unsurprisingly these included two mandatory death penalty statutes [34] and three guided discretion statutes.[35]

C. THE 1976 CASES—SOME GUIDELINES

For those who awaited definitive guidance in the area, these cases were somewhat of a disappointment. Not one of the cases was decided by a majority opinion, and the plurality opinions did not establish a set of definitive guidelines for evaluating capital punishment schemes. However, the core question not reached by the majority in *Furman*, the constitutionality of the death penalty in all circumstances, was answered in *Gregg v. Georgia*.[36] Seven justices agreed that the death penalty was not *per se* unconstitutional, and six found that the inherent and unavoidable discretionary decisions made prior to the trial, such as the decision to refer the case as a capital offense, did not invalidate the statute on constitutional grounds.[37] A majority of the Court found that the guided discre-

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[31] *Furman*, 408 U.S. at 417 (Powell, J., dissenting). This was followed by actions of courts or legislatures either to strike down or rescind the statutes or amend them. The one exception to this general statement is the U.C.M.J.

[32] Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1692 (1974).

[33] *Gregg*, 428 U.S. 153 at 179.

[34] Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

[35] Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

[36] 428 U.S. at 187 (1976).

[37] The judgment of the Court in *Gregg* was announced by Justice Stewart in an opinion joined by Justices Powell and Stevens. Concurring in these two aspects of the plurality

tion statutes of Georgia, Texas, and Florida did not violate the Eighth Amendment and that the mandatory death penalty statutes of Louisiana and North Carolina did. Even though the practical result of *Roberts v. Louisiana* [38] and *Woodson v. North Carolina* [39] was to invalidate all mandatory death penalty statutes, the Court's opinions also began a shift from the arbitrary and capricious sentencing focus of *Furman* to the concept of focusing on the individual defendant and the circumstances surrounding his crime.[40]

1. Gregg v. Georgia—Guided Discretion

Troy Leon Gregg was convicted and sentenced to death pursuant to the Georgia capital punishment statutory scheme for the armed robbery and murder of two men. He attacked his sentence on many grounds, including the core question not reached in *Furman*, the *per se* unconstitutionality of the death penalty.[41] A three-justice plurality, authored by Justice Stewart and joined by Justices Powell and Stevens, announced the judgment of the Court that the death penalty was not *per se* unconstitutional and that the inherent prosecutorial discretion did not render the entire process standardless.[42] In answering Gregg's attack on the Georgia statute, the Court had first to define the meaning of *Furman*. The Stewart plurality phrased the holding as follows:

> Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that

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opinion was Justice White in an opinion joined by the Chief Justice and Justice Rehnquist. Justice Blackmun concurred for the reasons in his dissent in Furman v. Georgia, 408 U.S. 238, 405–14 (1972) (Blackmun, J., dissenting). Justices Brennan and Marshall adhered to their positions in *Furman* that the death penalty was *per se* unconstitutional. 428 U.S. at 227 (Brennan, J., dissenting) and *id.* at 231 (Marshall, J., dissenting).

[38] 428 U.S. 325 (1976).

[39] 428 U.S. 280 (1976).

[40] The plurality opinion in *Woodson* found that the fundamental request for human dignity "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death." 428 U.S. at 304.

[41] In addition to advocating that the death penalty was under all circumstances cruel and unusual punishment Gregg attacked the specific Georgia statute as being unconstitutional. He argued that the changes were only cosmetic and that the arbitrariness and capriciousness condemned by *Furman* was still present due to the vagueness and overbreadth of the statute and the aggravating factors. Also challenged were the discretionary actions inherent in the prosecuting of a capital case in Georgia. Gregg argued that actions such as deciding whether to prosecute the case or plea bargain, or commuting the sentence by the governor, were essentially unfettered and therefore constitutionally infirmed. All of these arguments were rejected by the majority of the justices. *Gregg*, 428 U.S. 153, 198–207.

[42] *Gregg*, 428 U.S. 153, 187, 199. Justices White and Rehnquist and Chief Justice Burger agreed with the Stewart plurality on these two points, *id.* at 207, and Justice Blackmun concurred in the result, *id.* at 227. Justices Brennan and Marshall predictably dissented, holding to their initial positions in *Furman* that the death penalty is *per se* unconstitutional, *id.* at 227, 231.

> created a substantial risk that it would be inflicted in an arbitrary and capricious manner . . . *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.[43]

The Georgia statute was evaluated within this framework.

Under the new Georgia statutory scheme, the defendant is tried in a bifurcated proceeding, where guilt or innocence is determined in the first phase either by the jury or the judge.[44] If a lesser included offense is raised by the evidence, then the judge must so instruct the jury.[45] After a defendant is convicted of or pleads guilty to a capital offense,[46] a presentencing hearing is held in which the judge or jury hears additional argument from the state and the defendant, as well as evidence in aggravation or mitigation.[47] After this hearing, a death sentence can be imposed only if the sentencing body finds beyond a reasonable doubt that one or more of ten statutorily defined aggravating factors are present.[48] The

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[43] *Gregg*, 428 U.S. at 188.

[44] *Id.* at 163.

[45] Sims v. State, 203 Ga. 668, 47 S.E. 2d 862 (1948).

[46] The capital offenses under the Georgia code were murder, Ga. Code Ann. § 26-1101 (1972); kidnapping, § 26-1311 (1972); armed robbery, § 26-1902 (1972); rape § 26-2001 (1972); treason, § 26-2201 (1972); and aircraft hijacking, § 26-3301 (1972). The Supreme Court of Georgia in reviewing Gregg's conviction for murder and armed robbery upheld the death sentence for murder, but vacated the death sentence for armed robbery. Furman v. Georgia, 233 Ga. 117, 127, 210 S.E.2d 659, 667 (1974). The court reasoned that the death penalty had rarely been imposed in Georgia for armed robbery and that the jury improperly considered the murders as aggravating circumstances for the robberies. *Id.*

[47] Ga. Code Ann. § 27-2503 (Supp. 1975).

[48] Ga. Code Ann. § 27-2534.1 (Supp. 1975). The statute provides:

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

judge or jury must declare in writing which of the ten factors were found present. On a mandatory appeal the aggravating factor or factors are scrutinized by the Georgia appellate courts.[49] The Supreme Court of Georgia must determine not only that any aggravating factor is supported by the evidence but also that the sentence was not the product of prejudice or passion.[50] Finally the Georgia Supreme Court insures that the sentence is not disproportionate to the crime or inappropriate to the defendant and measures it against the sentences imposed for similar crimes elsewhere in Georgia.[51]

The Stewart plurality focused on three general aspects of the Georgia system which were found to satisfy the requirements of *Furman*. The first was a bifurcated trial in which a separate presentencing hearing allowed the sentencer to consider all evidence relevant to sentencing, including the defendant's character, the defendant's testimony in mitigation, and arguments by both sides.[52] Allowing both sides to argue the aggravating and mitigating evidence helped to focus the sentencer's attention on only the appropriate factors. The second aspect was the statutorily mandated aggravating factors which helped guide and limit the

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(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

[49] *Id.* at § 27-2534.1(c).

[50] *Id.* at § 27-2537.

[51] *Id.*

[52] *Gregg*, 428 U.S. 153, 190-92, 197. The plurality opinion emphasized the importance of a bifurcated trial in any constitutional capital punishment statute. However, they stopped short of making this a constitutionally required procedure, a position which had been flatly rejected in Spencer v. Texas, 385 U.S. 554 (1967), and again in Crampton v. Ohio, 402 U.S. 183, 221 (1971) (the companion case to McGautha v. California). However, it is difficult to imagine a constitutionally acceptable statutory scheme that would not include a bifurcated trial.

sentencer's discretion and removed the substantial risk that the death sentence was based on whim or prejudice.[53] That the sentencer was required to declare in writing the statutory basis for the death sentence was tied to the third aspect considered by the opinion, the appellate review. The plurality opinion found that the judicial review was especially important because it served "as a check against the random or arbitrary imposition of the death penalty." [54] Likewise, "the proportionality requirement on review . . . prevent[s] caprice in the decision to impose the penalty." [55] While pointing to the salient features of the Georgia system, the Court warned that these were not the only features which would satisfy *Furman*, rather "each distinct system must be examined on an individual basis." [56] The opinion emphasized that such an examination of a state statute must consider the sentencing system as a whole in determining if it sufficiently reduces the risk of arbitrary death sentences.[57]

Justice White wrote a separate opinion, joined by Chief Justice Burger and Justice Rehnquist, in which he agreed that Georgia had constructed a constitutional capital punishment scheme that satisfied *Furman*.[58] He placed great emphasis on the importance of the Georgia Supreme Court in reviewing all of the death penalties to insure that "death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside." [59] He continued to focus his attention on the establishment of a system which resulted in uniform sentences for similar offenses.[60] Only through the even and predictable imposition of the death penalty could a capital punishment system fulfill its purpose of providing deterrence. Justice Blackmun concurred in the judgment citing his dissent in *Furman*.[61] Justices Brennan and Marshall dissented in separate opinions finding that the death penalty under all circumstances violated the Eighth and Fourteenth Amendments.[62]

2. Jurek v. Texas—A Different Approach

The Florida statutory scheme considered in *Proffitt v. Florida* [63] was substantially the same as that in *Gregg* and can functionally be joined

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[53] *Gregg*, 428 U.S. 153, 196-98.
[54] *Id.* at 206.
[55] *Id.* at 203.
[56] *Id.* at 195.
[57] *Id.* at 200.
[58] *Id.* at 207. The separate opinion is much shorter and less detailed than the lead opinion and merely focuses on the Georgia capital sentencing procedures.
[59] *Id.* at 224.
[60] *Id.*
[61] *Id.* at 227 (Blackmun, J., concurring in judgment).
[62] *Id.* at 227 (Brennan, J., dissenting), 231 (Marshall, J. dissenting).
[63] 428 U.S. 242 (1976). The major difference between the Florida statute and Georgia's is that the trial judge, rather than the jury, determines the sentence, although the jury does return an advisory sentence.

for analysis. However, the provisions considered in *Jurek v. Texas* [64] differed from those of Florida and Georgia. Although the Texas statute is often considered in a group with these state statutes, it had essential differences.[65] The lead opinion in *Jurek*, again authored by Justice Stewart and only a plurality opinion, found that the statute provided for a bifurcated trial and special appellate review as in *Gregg*. The major difference was the manner in which the discretion of the sentence was guided. The Texas statute limited the death penalty to five types of intentional and knowing murders.[66] If the defendant was convicted of one of the five types, the statute provided for a presentencing hearing at the conclusion of which the jury was required to answer three questions. If the jury answered each question in the affirmative, meaning that the state had proven each beyond a reasonable doubt, then the death sentence was imposed. If the jury answered any question in the negative, then the sentence of life imprisonment was imposed. The three questions to be answered by the jury were as follows:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[67]

The plurality opinion found that the second question had been interpreted by Texas courts to mean that the defendant could introduce any

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[64] 428 U.S. 262 (1976).

[65] The Texas statute more closely resembles in construction the mandatory death penalty statutes than the guided discretion statutes. However, it is often grouped with the Georgia and Florida statutes because the Supreme Court found it to be constitutional.

[66] Tex. Penal Code, art. 1257(b) (1973). The Texas Penal Code authorized the death penalty for the following knowing, intentional murders:

(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

(3) the person committed the murder for renumeration or employed another to commit the murder for renumeration or the promise of renumeration;

(4) the person committed the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

Id.

[67] Tex. Code Crim. Proc., art. 37.071 (Supp. 1975-1976).

relevant information in mitigation.[68] The opinion concluded that by limiting the capital offenses to five specific situations, the jury in effect was required to find at least one statutory aggravating factor before the death sentence could be imposed, and that by the interpretation given to the second question, the jury was required to focus on the individual defendant and was free to consider any evidence in mitigation.[69] The Texas statute was found to achieve the same general result as the Georgia statute.

3. The Mandatory Statutes—The Requirement for Individualization

The interpretation of the second question by the plurality in *Jurek* becomes critical when the Texas statute is compared with the mandatory death penalty statutes which were held unconstitutional in *Roberts v. Louisiana* [70] and *Woodson v. North Carolina.*[71] The unconstitutional mandatory statutes designated a limited number of capital offenses and required that the death sentence be imposed if the jury found the defendant guilty of one of these offenses. The statutes completely eliminated sentencing discretion, although the Louisiana statute did allow the jury to be presented with instructions on all lesser included offenses regardless of whether they were raised or supported by the evidence.[72] The Court found that the mandatory death penalty had been rejected as an unconstitutional manner of imposing the death sentence.[73] The Stewart plurality also found that these sentencing provisions did not allow the sentencing body to focus on the particularized facts and circumstances of the crime and the individual.[74] They raised to constitutional proportions the requirement for an individualized sentence, stating that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstance of the particular offense as a constitutionality indispensable part of the process of inflicting the penalty

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[68] 428 U.S. 262, 272.

[69] 428 U.S. 262, 276.

[70] 428 U.S. 325 (1976).

[71] *Woodson*, 428 U.S. 280 (1976). The plurality opinion in *Jurek* recognized that without the opportunity to individualize the sentence and consider mitigating information, the Texas scheme would "approach the mandatory laws that we today hold unconstitutional in *Woodson* and *Roberts v. Louisiana*." *Jurek*, 428 U.S. 271 (plurality opinion) (citations omitted). The crucial question to the Court was whether the statutory questions "allowed consideration of particularized mitigating factors." *Id.* at 272.

[72] La. Code Crim. Proc. Ann., arts. 809, 814 (Supp. 1975). The plurality was highly critical of this procedure because it invited them to disregard their oaths and added capriciousness to the process. *Roberts*, 428 U.S. 325, 335.

[73] *Woodson*, 428 U.S. 280, 301 and *Roberts*, 428 U.S. 325, 333. The Stewart plurality was joined in both cases by Justices Brennan and Marshall to form the majority. Both Justices Brennan and Marshall concurred only in the judgment, based upon their position that the death penalty was unconstitutional *per se*.

[74] *Woodson*, 428 U.S. 280, 303 and *Roberts*, 428 U.S. 325, 333.

of death." [75] These mandatory schemes foreclosed the jury from considering any evidence other than that presented during the trial on the merits. The vital distinction between the Louisiana and North Carolina statutes and the constitutional scheme in Texas was that the Texas jury could consider any mitigating evidence presented by the defense in answering the second statutory question.[76] The defense could present evidence at the sentencing stage after the question of guilt or innocence had been determined which allowed the court to receive relevant information to individualize the sentence.

This same concept of individualization had been alluded to in *Gregg* when the Stewart plurality stated, "*Furman* held . . . the decision to impose [the death penalty] had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." [77] This individualization aspect of the Eighth Amendment procedural requirements was elevated to constitutional proportions in *Woodson*,[78] and gained even more prominence two years later in *Lockett v. Ohio*.[79] The emphasis on individualization evidenced a shift in the Court's analysis and also marked the beginning of a withdrawal from the theory implicit in *Furman*, that sentences should be uniform and that there should be a rational basis to distinguish those who should die from those who should live.[80] By focusing on the particularized circumstances of the crime and the defendant's character, the Court seems to be encouraging the sentencer to exercise mercy. Exercising mercy would necessarily detract from a rational-basis approach to deciding who dies and who lives and blurs the distinction between the two. This contradiction with the *Furman-Gregg* rationale has never been addressed in detail.[81]

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[75] *Woodson*, 428 U.S. 280, 304.
[76] *Jurek*, 428 U.S. at 272-274.
[77] *Gregg*, 428 U.S. 153, 199.
[78] 428 U.S. 280, 304.
[79] 438 U.S. 586 (1978).
[80] Justice White's dissent was predictable as he was the main proponent of the requirement of uniformity and a meaningful difference between those sentenced to death and those sentenced to a lesser punishment. *Furman*, 408 U.S. at 312 (White, J., concurring).
[81] The plurality in *Gregg* considered the problem of mercy in the setting of discretionary acts of officials both before and after trial. They answered this attack on the Georgia statute by bluntly stating that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." 428 U.S. 153, 199. Also attacked was the jury's ability at trial to decline to impose the death penalty even if one or more aggravating factors were present. The Court likewise bluntly rejected the argument as misinterpreting *Furman*, and found that the isolated decision of a jury to afford mercy did not render the statute unconstitutional. *Id.* at 203. This, however, bypasses the issue of the functional effect on the sentencing scheme. The decision to afford mercy is inherently discretionary and extremely difficult, if not impossible, to guide. *See* note 121 and accompanying text *infra*. The ability to afford mercy can be denied, a procedure implied from the underlying theory of *Furman*, which would result in more rationally discernible differences

D. THE INTERIM

In the interim between *Gregg* and *Lockett*, the Court considered several other aspects of capital sentencing and further shaped the dimensions of the death penalty area. The Court considered a different aspect of the mandatory death penalty statutes when it ruled in *Roberts v. Louisiana* [82] that the murder of a policeman was not so egregious that it validated the mandatory imposition of the death penalty without consideration of mitigating factors. In *Coker v. Georgia*,[83] a four-justice plurality joined by three other justices found that the imposition of the death penalty was excessive and disproportionate for the rape of an adult female where the victim is not killed.[84] *Coker* is an especially important case as the Court found substance in the Eighth Amendment as it pertains to the imposition of death. Also, this was the first case in the death penalty area which relied exclusively on a proportionality analysis.[85]

In a more procedural vein, the Court ruled in *Gardner v. Florida* [86] that the defendant's due process rights were violated when he was not informed of all the information considered by the judge in forming his decision to impose the death penalty. This decision highlights the Court's concern for insuring reliability in the decision to impose death at every phase of the proceeding.[87]

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between those sentenced to die and those sentenced to live. However, the Court apparently found this incompatible with its desire to focus the sentencer's attention on the appropriate facts of the particular offense and the defendant. This was evident by its decisions in *Woodson* and *Roberts* and made distinctly clear in *Lockett*. This, however, ignores the effect of the jury's discretion to afford mercy on the underlying rationale of *Furman*. Justice White recognized this conflict in his dissent in *Lockett*, warning of a return to the pre-*Furman* state of affairs. 438 U.S. 586, 623 (White, J., concurring in part, dissenting in part, and concurring in the judgment). He found that excessive use of mercy by the sentencing body would negate the distinction between those who should live and those who should die. Eliminating this rational distinction undermines the purpose of the death penalty which would become only a "pointless and needless extinction of life" and hence unconstitutional under the Eighth Amendment. *Id. citing* Furman v. Georgia, 408 U.S. 238, 312 (White, J., concurring).

[82] 431 U.S. 633 (1977). This case is often referred to as *Roberts II* to distinguish it from Roberts v. Louisiana, 428 U.S. 325 (1976). *See also* the summary disposition in Washington v. Louisiana, 428 U.S. 906 (1976).

[83] 433 U.S. 584 (1977).

[84] The plurality opinion focused on the qualitative difference between the killing of a human being and any other form of crime. While rape was viewed as a very serious crime the plurality found that it did not justify the death penalty, even though it "may measurably serve the legitimate ends of punishment." *Id.* at 592 n.4. In order to support their positions, the justices relied heavily upon the fact that juries rarely sentenced a rapist to death and only a few states provided for capital punishment for the crime of rape.

[85] This same analysis was used by the court in Enmund v. Florida, 102 S. Ct. 3368 (1982), to find that the death penalty was a disproportionate punishment for an individual convicted of felony murder who did not intend the victim's death.

[86] 430 U.S. 349 (1977).

[87] This concern was manifested in a subsequent decision, Beck v. Alabama, 447 U.S. 625 (1980), where the majority found a portion of the Alabama statute unconstitutional be-

E. THE INDIVIDUALIZATION REQUIREMENT COMES OF AGE—LOCKETT V. OHIO

In 1978 the Supreme Court decided the companion cases of *Lockett v. Ohio* [88] and *Bell v. Ohio*,[89] examining the Ohio death penalty statute which was almost identical to the Texas statute considered in *Jurek v. Texas*. The plurality opinion, authored by Chief Justice Burger, found that the Ohio sentencing process failed to focus on the character of the defendant because it limited the mitigating evidence that could be considered by the sentencers.[90] In the Ohio scheme, after finding the defendant guilty of one of a small group of aggravated murders,[91] the sentencer had to impose the death penalty unless one or more of three statutorily prescribed mitigating factors were present.

> (1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation.
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency though such condition is insufficient to establish the defense of insanity.[92]

The Court found that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [93] The statutory scheme must allow this evidence to be considered and must not limit how the sentencer can use the evidence.

> But a statute that prevents the sentencer in all capital cases from giving *independent mitigating weight* to aspects of the defendant's character and record and to circumstances of the offenses proferred in mitigation creates the risk that the death

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cause it did not allow the jury to be instructed on lesser included offenses even though raised by the evidence. The touchstone was the reliability of the judicial process and the decision to impose the death penalty. The justices were concerned that all relevant information was not being presented to the sentencing body and that the jury was not free to find the defendant guilty of a noncapital offense.

[88] 438 U.S. 586 (1978).

[89] 438 U.S. 637 (1978).

[90] *Lockett*, 438 U.S. 586, 608.

[91] These forms of aggravated murder are very similar to the capital offenses of the Texas statute. See note 66 *supra*. Sandra Lockett was found guilty of murder while in the commission of aggravated robbery, one of the statutory aggravated murders. Ohio Rev. Code Ann. § 2929.04(A)(7) (1975). She was convicted under an aider and abettor theory.

[92] Ohio Rev. Code Ann. § 2929.04(B) (1975).

[93] 438 U.S. 586, 604 (footnote deleted).

> penalty will be imposed in spite of factors which may call for a less severe penalty. (emphasis added).[94]

The mitigating factors in *Lockett* which could not be considered by the sentencing body, because of the construction of the three questions, were the absence of a specific intent on the part of the defendant to murder the victim of the armed robbery and the defendant's minor role in the offense.[95]

The ramifications of this decision may not be felt for some time, but the Court has established an interesting tension in the capital punishment area. The Court has apparently shifted its focus from the arbitrary analysis which was the basis of *Furman* and the core of *Gregg*, *Proffitt*, and *Jurek*. Now the focus is on the uniqueness of the crime and the individualization of the sentence, concepts referenced in *Gregg*,[96] utilized in *Roberts* [97] and *Woodson*,[98] and brought to fruition in *Lockett*.[99] This analysis denounces any system that limits the discretion of the sentencer to consider any relevant, mitigating evidence and to weigh independently the evidence. This focus, as will be discussed later, creates

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[94] *Id.* at 605 (plurality opinion).

[95] *Id.* at 608. It would be possible to distinguish the plurality opinion in *Lockett* on the facts were it not for the thread which links this opinion to statements made in *Gregg*, *Jurek*, *Woodson*, and *Roberts*. *See* notes 40 and 71 *supra*. Additionally, the intent of the Chief Justice to clarify and reconcile different views in this area underscores the importance of this opinion. *Id.* at 602.

The holding in *Lockett* was followed by the Court in a recent decision, Eddings v. Oklahoma, 102 S. Ct. 869 (1982). While much of the publicity and argument focused on the young age of the defendant, the Court side stepped the issue by utilizing the *Lockett* rationale to overturn the death sentence. A majority found that the trial judge interpreted the statute as precluding him from considering as mitigating factors certain aspects of Eddings' background. *Id.* at 875.

The dissenting opinions of Justices White and Blackmun in *Lockett* are also noteworthy because they presaged another recent Supreme Court decision, Enmund v. Florida, 102 S. Ct. 3368 (1982). *See* note 8 *supra*. Justice White disagreed with the reasoning of the plurality opinion, *see* note 80 *supra*, although he too found that Lockett's death sentence should be vacated. 438 U.S. at 621 (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court). He found that the Eighth Amendment is violated when the death penalty is imposed without a finding that the defendant intended to cause the death of the victim. *Id.* at 624. The imposition of the death penalty in this situation is disproportionate because it does not contribute to the acceptable goals of punishment and is not proportionate to the severity of the crime. *Id.* at 624 *citing* Coker v. Georgia, 433 U.S. 584, 592 (1977). This conclusion was based primarily upon the lack of a viable relationship between the imposition of death and its deterrent effect on others due to the lack of intent to cause the death of the victim. Justice Blackmun found the statute deficient because it did not allow the sentencer to consider the *mens rea* of the defendant. *Id.* at 613 (Blackmun, J., concurring in part and concurring in the judgment). He also found that the Ohio statutory scheme violated the Court's holding in United States v. Jackson, 390 U.S. 570 (1968).

[96] 428 U.S. 153, 197.

[97] 428 U.S. 325, 333.

[98] 428 U.S. 280, 303.

[99] 438 U.S. at 605.

theoretical problems for any uniform approach to the constitutionality of a particular statute. The implications of this focus were not lost on Justice White who observed: "Today it is held, again through a plurality, that the sentencer may constitutionally impose the death penalty only as an exercise of his unguided discretion . . . ." [100] He went on to comment that in effect the Court had returned to the situation that existed before *Furman*.[101] Some commentators have viewed this decision as merely an extension of the rights of the capital defendant, giving the sentencing body every opportunity to sentence the defendant to a less severe sentence.[102] While the plurality in *Gregg* had found no contradiction with *Furman* in allowing the sentencer to grant mercy,[103] the decision in *Lockett* is much more sweeping and creates a more substantial problem with *Furman*.

In decisions after *Lockett*, the Supreme Court has used both the arbitrariness analysis and the individualization analysis. In *Godfrey v. Georgia*,[104] the Supreme Court used an arbitrariness approach to strike down a death sentence based upon a statutory aggravating factor which it found so vague as to result in a standardless decision by the jury. Since the decision was based on the definition of the aggravating factor, *Godfrey* may indicate that the arbitrariness analysis will be applied only at this stage. Just one term later in *Beck v. Alabama*,[105] the Court resorted to the reasoning inherent in *Lockett* when it struck down the provision of the Alabama capital punishment statute that did not allow the jury to be instructed on lesser included offenses even though raised by the evidence. The Court found that this procedure confused the jury, increased the risk of an unreliable sentence, and did not allow for an individualized sentence.[106]

Most recently in *Eddings v. Oklahoma* [107] the Court used the *Lockett* reasoning to invalidate the death sentence which had been imposed upon an Oklahoma youth who was sixteen years old at the time he murdered a state policeman. Bypassing the issue of Eddings' youth,[108] the Court in-

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[100] *Lockett*, 438 U.S. 586, 622.

[101] *Id.* at 623.

[102] Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Calif. L. Rev. 317 (1981).

[103] *Gregg*, 428 U.S. 153, 199 (plurality opinion).

[104] 446 U.S. 420 (1980).

[105] 447 U.S. 625 (1980).

[106] *Id.* at 643.

[107] 102 S. Ct. 869 (1982).

[108] Certiorari was initially granted only on the issue of Eddings' age at the time of the murder. Accordingly, this was the main thrust of the arguments before the court. The fact that this issue was ignored and the case decided on another issue incurred the criticism of the dissent. *Id.* at 879 (Burger, C.J., dissenting).

stead focused on the mitigating factors considered by the trial judge. The majority [109] found that the trial judge had failed to consider in mitigation certain aspects of Eddings' character and background,[110] because he found that as a matter of law he could not consider them.[111] The Court concluded that this action violated the Eighth Amendment for the reasons announced in *Lockett* because a sentencer must be free to consider any relevant mitigating factor.[112]

F. THE SUPREME COURT'S POSITION TODAY

Due to the lack of consensus and the varying reasoning of the cases in this area, the law must be determined by results. It is difficult to arrive at what precise principles the Court will employ today.[113] With the retirement of Justice Stewart, the author of the swing or centralist plurality in the majority of the cases, the predictability of the Court is less.[114] However, chief Justice Burger who wrote for the three-justice plurality in *Lockett* intended to establish definitive guidelines to end confusion.[115] It appears that the Court has shifted, at least in emphasis, from the arbitrariness analysis to the concepts of individualization and reliability. While the change in focus was within the framework of statutes which limited and guided discretion, it poses problems in analyzing any given scheme. As most state statutes now follow either the *Gregg* or *Jurek* approved models, only minor adjustments must be made to avoid the problem encountered in *Lockett*. However, when applying existing principles to any new or untested variant, such as the U.C.M.J. provisions, complications ensue. This difficulty is exacerbated by the apparent conflict between the reasoning announced by the plurality in *Lockett* and the underpinings of *Furman* and *Gregg*. The contradiction focuses on the extent to which the jury's discretion can be limited and guided.

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[109] The majority consisted of Justices Powell, Stevens, Marshall, Brennan, and O'Connor. Chief Justice Burger was joined in dissent by Justices White, Rehnquist, and Blackmun. *Eddings*, 102 S. Ct. 869.

[110] The mitigating factors that the trial judge refused to consider were Eddings' unhappy and violent upbringing and emotional disturbances. He considered Eddings' youth at the time of the murder but found that this did not outweigh the aggravating factors. *Id.* at 873.

[111] This point was heavily contested by the dissent, who criticized the majority for too closely reading the judge's oral statement at the conclusion of the trial. *Id.* at 881.

[112] *Id.* at 879. The Court remanded the case for resentencing and a consideration of all the mitigating factors.

[113] The following Supreme Court cases in the capital punishment area are the only ones with a majority opinion: Eddings v. Oklahoma, 102 S. Ct. 869 (1982) (five justice majority); Beck v. Alabama, 447 U.S. 625 (1980) (six justice majority opinion); Roberts v. Louisiana, 431 U.S. 633 (1977) (*Roberts II*, per curiam decision in which five justices joined).

[114] Justice O'Connor's voting in *Eddings* and *Edmund* indicates that her vote cannot be counted on by any group within the Court.

[115] *Lockett*, 438 U.S. 586, 602. The importance of this case and its rationale is convincingly underscored by the *Eddings* decision.

The several constitutional methods to limit and guide the discretion of the sentencing body can be grouped into two major approaches. The legislature can either limit or guide the sentencing body at the definitional stage, by defining the class of capital offenses, or at the sentencing stage, by limiting the aggravating factors which may be considered. In the latter approach, the sentencer must find one of the aggravating factors present before the death penalty can be imposed. The essential question under the *Lockett* rationale is how the aggravating factor is weighed against any mitigating evidence. *Lockett* requires that the sentencer be free to give independent mitigating weight to any evidence presented by the defendant.[117] Thus the sentencer must be free to exercise almost unbridled discretion in weighing aggravating factors against mitigating information. What appears to be constitutionally mandated is the right to have the jury afford mercy on whatever grounds it may decide.[118] This seriously undercuts the possibility of creating a system which will result in uniformity. While the sentencers must still find that an aggravating factor existed before the death sentence can be imposed, the statutory factors must necessarily be broad enough to cover potential variations in the facts surrounding the offense and the character of the accused.[119] Accordingly, the sentencer may quite easily find in many cases at least one aggravating statutory factor that is supported by the facts of the case. Likewise, the decision of a jury not to impose a death sentence because of a relevant mitigating factor is by definition not arbi-

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[116] Although it would appear that there is little distinction between these two methods, there are sharp differences in practice. By providing guidance at the definitional stage, the legislature narrows the total group of potential recipients of a death sentence. At trial the defendant is assigned to this group by the judge or jury during the findings phase, where guilt or innocence is determined. At that time the finders of fact are focusing primarily on the question of guilt or innocence, not sentence. The judge or jury will tend to be more precise and reliable in defining this group because of this focus. The instructions will be precise and based upon court tested definitions of crimes. Only after finding the person guilty will the sentencer decide the question of whether to impose the death penalty.

When the aggravating factors are introduced at the sentencing stage, a different chemistry exists. The sentencing body in that case is faced with performing the two-step procedure discussed above in one step. At the sentencing phase the sentencer must not only define the defendant as belonging in that group which could potentially be given the death sentence but also analyze the relevant mitigating factors. Thus the definition process at sentencing, which occurs when an aggravating factor is found, can become less reliable because of the interplay of the competing interests.

[117] 438 U.S. 586, 605.

[118] *Id.* at 622 (White, J., dissenting).

[119] Because the aggravating factors that are introduced into the trial at the sentencing level must usually limit a large number of capital offenses, they must be able to be applied to a wide range of circumstances. It is even more so when the defense is not restricted in the mitigating evidence they may present. Also present is the danger that because the sentencer is both finding the aggravating factor and considering the mitigating factors presented, the guidelines in the aggravating factors may be ignored or stretched to accommodate the sentencer's decision that the defendant should be put to death. Essentially, before the sentencers can narrow the group by finding the aggravating factors, they are confronted with the question of whether the defendant should die. *See* note 116, *supra*.

trary because there is a reasonable basis for the decision. However, this poses a problem in practice because *Lockett* and *Eddings* decisions hold that the sentencing body cannot be limited in what it believes to be a relevant factor and the weight that will be given to that factor.[120] Additionally, since the decision to afford mercy is not reviewable, there is no practical method to insure that mercy is not granted arbitrarily. The unbridled discretion of the jury to afford mercy may act to introduce arbitrary death sentences because the decision to afford mercy may easily be withheld. If mercy is meted out to the "favored" of society and withheld from minorities, then the vice condemned in *Furman* returns.[121]

The *Lockett* and *Eddings* decisions indicate that the goal of uniformity so valued by Justice White [122] is no longer of paramount importance and may even be viewed as being at odds with the goal of individualization.[123] The ramifications of this are potentially great as uniformity was a primary basis in *Gregg* for the requirement to limit and guide the jury's discretion.[124] However, in a fundamental sense uniformity was merely a vehicle to insure that the decision to impose the death penalty was not arbitrary and capricious. The underlying fear that drove the majority in *Furman* was that persons were being sentenced to death for reasons other than the circumstances of the crime.[125] The danger can still be reduced within the confines of the *Lockett* decision, although there is significant tension between the competing interests and principles.

There are reasons, beside uniformity, that require the jury's discretion be limited and guided. The legislature is essentially defining a group of individuals who have committed crimes under circumstances which society believes warrants the imposition of the death penalty. Whether it be by defining the category of crimes or aggravating factors at the sentencing stage, the legislature is insuring that there is some minimal reasonable basis for the death sentence. This theoretically eliminates arbitrariness; however, the above discussion indicates that the logic of *Lockett* maintains the possibility of arbitrariness.[126] Given the requirements of *Lockett*, the protection against arbitrary and capricious imposi-

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[120] *Lockett*, 438 U.S. 586, 605.

[121] *Id.* at 623 (White, J., concurring in part, dissenting in part, concurring in the judgments of the Court).

[122] *Id.* at 623 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court) (citing Justice White's opinion in *Furman*, 408 U.S. 238, 312).

[123] *Id.*

[124] *Gregg*, 428 U.S. 153, 188-89. The other rationale for the narrow aggravating factors, the need to provide guidance to inexperienced jurors, may not be required to the same degree in the military because of the experience of the court-martial panel. *See* note 222 and accompanying text *infra*.

[125] Although this was implicit in all the majority's opinions it was most directly addressed by Justice Douglas. *Furman*, 408 U.S. at 249 (Douglas, J., concurring).

[126] *See* note 81 *supra*.

tion of the death penalty is a meaningful and thorough appellate review.[127] A secondary effect of *Lockett* is to seemingly favor the use of guidance at the crime definition stage rather than during sentencing. As the definitions method operates when the jury finds an individual guilty of a capital offense, well defined and established elements of proof are employed, thus making review easier. Additionally, it is less likely that prejudice or whims will be involved at the findings stage. These and other improper motives in imposing the death penalty are more usually encountered during the sentencing phase. Thus, the finding of the minimal circumstances warranting death is performed at a stage where the methodology is generally more logical and more focused on the facts of the offense.[128] It also results in an easier task for the appellate courts to determine for any given death sentence whether it was based on permissible criteria.[129]

Perhaps the most important effect of the demise of the principle of uniformity is the degree to which the jury's discretion is limited. When the jury's discretion was limited under the uniformity principle, the jury's guidance necessarily had to be detailed to arrive at similar results for similar factual circumstances. While the jury still needs to be guided, the emphasis should be on a system that focuses the jury's attention on the factual circumstances of the crime and the character of the defendant. While this was one of the rationale used in *Gregg*,[130] it has a different thrust in the post-*Lockett* capital cases. Guidance under this theory is not designed to achieve uniform results,[131] but to increase reliability in the entire process, and to establish a record upon which the appellate courts may render a meaningful review. The guidance acts to supply the reasonable, legal basis for the imposition of the death penalty. After the threshold determination of whether the defendant has committed a capital offense, the system must allow the jury to consider any relevant factors and give these independent weight in determining whether a death sentence is appropriate.[132] The practical result is to create a lesser

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[127] *Cf. Gregg*, 428 U.S. at 206 (plurality opinion) (emphasizing the importance of appellate review as the final check against arbitrary imposition of the death penalty).

[128] This is especially true when the jury is not informed that a conviction for the alleged offense exposes the defendant to the death penalty. This is particularly germane to military courts-martial where the court members are not informed during the findings phase whether the convening authority has referred the case capital. Paragraph 35, M.C.M. Where the trial is bifurcated, the jury is allowed to focus on the facts relating to the crime without having to consider whether to impose the death penalty.

[129] With the wide discretion afforded the sentencing body after *Lockett* it is much more difficult to review a decision formulated where part of the equation contains unknown parameters.

[130] *Gregg*, 428 U.S. at 199 (plurality opinion).

[131] This is implicit from the jury being given broad discretion in considering and weighing mitigating factors. *See Lockett*, 438 U.S. 586, 623 (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court).

[132] *Id.* at 605.

requirement for specificity and a resulting lessening of the limitations that constitutionally must be placed upon the jury's discretion.

It is difficult to reconcile the competing concepts into a unified approach in a statute. However, certain guidelines can be synthesized to emphasize the basic general prohibitions and requirements. The goal of the entire statutory scheme must be to reduce the risk of arbitrary and capricious imposition of the death penalty.[133] The statutory scheme must utilize some guidance or procedures to limit the group of defendants subject to the death penalty, and it must insure that only those defendants society has determined "deserve" to die are exposed to the penalty of death.[134] The guidance is best introduced at the stage where the legislature defines the capital offenses.[135] At trial the procedures must be carefully scrutinized to insure reliability at every stage to reduce the risk that the sentencing body be precluded from considering a factor that would call for a less severe penalty.[136] The sentencing body at trial must be able to exercise almost unbridled discretion to consider any relevant mitigating factor and to give it independent weight in deciding whether to impose the death sentence.[137] The bifurcated trial becomes almost an essential procedure to focus properly the attention of the sentencing body and to allow all relevant evidence to be considered.[138] Review of the case grows in importance to act as a final check against improper imposition of the death penalty.[139] The uniformity in sentencing seen as a goal of *Furman* is no longer of paramount importance. Due to the discretion that must be afforded the sentencing body, review acts only to protect against egregious decisions or procedures to impose death. Overall, increased reliance must be placed on interlocking procedures throughout the court system to increase the reliability of the decision to impose the death sentence and to sufficiently reduce the likelihood of arbitrariness and caprice.[140] Although the Court's decisions in this area are not conceptually uniform or consistent; they do establish general considerations which can be used to analyze a statute coming before the Court for the first time.

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[133] *Gregg*, 428 U.S. 153, 189 (plurality opinion) (construing *Furman*).

[134] *Cf. id.* at 192-195.

[135] *See* note 119 *supra*.

[136] *Lockett*, 438 U.S. 586, 605 (plurality opinion).

[137] *Id.* at 622-23 (White, J., dissenting).

[138] While the importance of a bifurcated trial was stressed vigorously in *Gregg*, 428 U.S. at 191-92, the Court left undisturbed the prior decisions which had rejected the assertion that a bifurcated trial was a constitutional requirement. *See* note 52 *supra*.

[139] *Gregg*, 428 U.S. at 198 (plurality opinion).

[140] *Cf.* Beck v. Alabama, 447 U.S. 625 (1980) (statute cannot prohibit the judge from instructing on lesser included offenses); Godfrey v. Georgia, 446 U.S. 420 (1980) (vague aggravating factor rendered jury decision standardless).

III. THE APPLICATION OF THE CONSTITUTIONAL STANDARDS TO THE MILITARY

A. THE GENERAL APPLICATION OF THE BILL OF RIGHTS TO THE MILITARY

Any analysis of the constitutionality of the capital sentencing provision of the U.C.M.J., in light of *Furman* and its progeny, must necessarily start with the question of whether and to what extent these cases are applicable to military law. This many faceted problem goes far beyond the narrow question of the applicability of the Eighth Amendment considerations. It involves the interplay between the Court and Congress under the Constitution, and the applicability of the Bill of Rights to military society.

Recently Chief Judge Everett of the Court of Military Appeals remarked in an opinion: "The time has long since passed when scholars disputed the applicability of the Bill of Rights to service personnel." [141] Only one amendment, the Fifth, expressly excepts the military from a constitutional requirement, the requirement for indictment by grand jury.[142] However, the application of the remaining constitutional amendments to the military has not been as clear or as simple as the Chief Judge's comment implies.

In a long line of cases dating back to the time of the formation of this nation, the Supreme Court and other federal courts have recognized that the military society and its justice system is inherently and fundamentally different from civilian society and its criminal law system.[143] The difference in military courts created by the Congress pursuant to Article I of the Constitution [144] and Article III courts was recognized by the Supreme Court in *Dynes v. Hoover*:

> These [constitutional] provisions show that Congress has the power to provide for the trial and punishment of military and

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[141] United States v. Stuckey, 10 M.J. 347, 349 (C.M.A. 1981) (opinion of Everett, C.J.). *See also* United States v. Jacoby, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960) ("the protections of the Bill of Rights, except those which are expressly or by necessary implications inapplicable, are available to members of our armed forces").

[142] By implication the Sixth Amendment right to trial by jury has also been held inapplicable to the military. *See* O'Callahan v. Parker, 395 U.S. 258, 261-63 (1969).

[143] *See e.g.* Parker v. Levy, 417 U.S. 733, 758 (1974); O'Callahan v. Parker, 395 U.S. 258, 262 (1969); Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion); Orloff v. Willoughby, 345 U.S. 83, 94 (1953); Kurtz v. Moffett, 115 U.S. 487, 500 (1885); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

[144] U.S. Const. art. I, § 8, cl. 14. "[t]he Congress shall have power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces."

> naval offenses in the manner then and now practiced in civilized nations, and that the power to do so is given without any connection between it and the 3rd Article of the Constitution, defining the judicial power of the United States, indeed, that the two powers are entirely independent of each other.[145]

At the heart of this difference is the mission of the armed forces to protect the nation and what has traditionally been termed "military necessity," those practical aspects of military life which are necessary for the maintenances of good order and discipline in the armed forces. One of the staunchest defenders of personal liberties, Justice Douglas, based the justification for a "special system of military courts in which not all of the specific procedural protections deemed essential in Article III trials need apply" upon the requirements of military discipline.[146] If the armed forces are to accomplish properly their mission to protect and defend the United States, they must be regulated in a manner consistent with this special need. This has traditionally formed the basis for the Supreme Court's position that "[t]he military community constitutes a specialized community governed by a separate discipline from that of the civilians." [147] Even though military society is different, service members do not give up their constitutional rights, though the application of them to the military differs because the constitutional rights must be viewed through the filter of military necessity. The Supreme Court, in *Parker v. Levy*,[148] has recognized in the First Amendment area that:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and the military mission require a different application of these protections . . . . The fundamental necessity for obedience and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[149]

These are powerful words; however, the doctrine of military necessity cannot be used as a mere talisman to vitiate the basic constitutional rights of service members.

Some balance must be struck between the rights of service members and the mission of the armed forces and the resultant requirement for good order and discipline. The judiciary has traditionally accorded great

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[145] 61 U.S. (20 How.) 65, 79 (1857).
[146] O'Callahan v. Parker, 395 U.S. 258, 261 (1969).
[147] Orloff v. Willoughby, 345 U.S. 83, 94 (1953).
[148] 417 U.S. 733 (1974).
[149] *Id.* at 758.

deference to congressional controls over the military in this regard because of the specific grant of authority in the Constitution.[150] In *Middendorf v. Henry* [151] the nature of this balancing process was analyzed. *Middendorf* held, citing prior Supreme Court cases, that the framers of the Constitution had entrusted this duty to Congress. "In making such an analysis, we must give particular deference to the determination of Congress, made under its authority to regulate the land and sea forces." [152] Thus the decision of Congress regulating the armed forces is the starting point in determining the application of the Bill of Rights to the military. Practically, this starting point is the U.C.M.J. and the rights that Congress has accorded the military accused.

B. THE APPLICABILITY OF THE EIGHTH AMENDMENT AND FURMAN

Historically, the Eighth Amendment was not considered applicable to the military, apparently prompting Congress in enacting the U.C.M.J. in 1949 to include Article 55 [153] to deal with this issue.[154] However, since that time military and federal courts have held that the Bill of Rights generally applies to the military.[155] Since there appears to be no exemptions mentioned in the wording of the Eighth Amendment, it was assumed that it applied to the military. However, since constitutional rights have not been applied to the military in the same manner as applied to civilian society, the question more properly is whether the *Furman* series of cases applies to the military.

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[150] U.S. Const. art. I, § 8, cl. 14. In his concurring opinion in Reid v. Covert, 354 U.S. 1 (1957), Justice Frankfurter summarized this historical deference in strong terms as follows:

> Everything that may by deemed as the exercise of an allowable judgment of Congress, to fall fairly within the conception conveyed by the power given to Congress "To make Rules for the Government and Regulation of land and naval Forces" is constitutionally within the legislative grant and not subject to revision by the independent judgment of the Court.

Id. at 43-44.

[151] 425 U.S. 25 (1976).

[152] *Id.* at 43.

[153] Article 55, U.C.M.J. reads as follows:

> Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel and unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

[154] *See* Dawson, *Is the Death Penalty in the Military Cruel and Unusual Punishment?*, 31 JAG J. 53, 60 n.36 (1980). The text of Article 55, U.C.M.J., is an expansion of the wording of Article 41 of the Articles of War which likewise prohibited cruel and unusual punishment.

[155] *See e.g.* United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981); United States v. Jacoby, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

The starting point is logically the *Furman* decision. None of the five justices in the majority mentioned the effect on military law, but there are several references by the dissenters. Justice Powell, commenting on the effect of the decision, stated that, "numerous provisions of the . . . Uniform Code of Military Justice also are voided." [156] Justice Blackmun, much more cautious about the result, stated; "Also in jeopardy, perhaps, are the death penalty provisions in various Articles of the Uniform Code of Military Justice." [157] Perhaps Justice Powell reacted too quickly as the Supreme Court has never ruled specifically that these constitutional requirements apply to the military.

The Court has, however, decided a case that arguably addresses the issue. In 1974, the Court was confronted with an attack upon the constitutionality of the military death penalty in *Shick v. Reed*,[158] and although it did not decide that specific issue, the manner in which the case was framed is revealing. Master Sergeant Shick had been convicted of murder and sentenced by a court-martial to death; however, in 1960 President Eisenhower commuted his sentence to life imprisonment without parole. Shick argued that since the military death penalty was unconstitutional, the only remaining authorized sentence, life imprisonment without condition, was the proper punishment. The Court framed the issue as follows:

> First, was the conditioned commutation of his death sentence lawful in 1960; second, if so, did *Furman* retroactively void such conditions; and third, does that case apply to death sentences imposed by military courts *where the asserted vagaries of juries are not present* as in other criminal cases? (emphasis added).[159]

The Court resolved the first two issues without reaching the third, stating that it reached its result "even if *Furman v. Georgia* applies to the military, a matter which we need not and do not decide." [160] Even with this disclaimer, the Court's statement of the third question implies that it considered the underlying reasons for the decision in *Furman* not present in courts-martial. The dissent, written by Justice Marshall and joined by Justices Douglas and Brennan, argues at length that *Furman* does apply to the military.[161] The conclusion that can be drawn from such a reaction is that the three dissenters viewed the majority's opinion as ruling *sub silentio* that *Furman* does not apply to the military.

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[156] *Furman*, 408 U.S. 238, 417-18 (Powell, J., dissenting).
[157] *Id.* at 412 (Blackmun, J., dissenting).
[158] 419 U.S. 256 (1974).
[159] *Id.* at 260.
[160] *Id.* at 268.
[161] *Id.* at 271 (Marshall, J., dissenting).

Regardless of how the Court framed the issues in *Schick v. Reed*, the issue of applicability was not specifically reached.[162] Likewise, the history of the Court's application of constitutional rights to service members strongly suggests that the Court will apply the fundamental right but allow restrictions if military necessity dictates.[163] Thus for the purposes of this article, it will be assumed that the general constitutional requirements formulated by the Supreme Court in *Furman* and its progeny are in some measure applicable to the military justice system. This answers only the threshold question, the crucial question being the existence of any relevant considerations of military necessity and how they modify the application of the Eighth Amendment rights.

C. MILITARY NECESSITY FOR THE DEATH PENALTY

Three major realities of military society create a special need for the death penalty and necessitate a different approach to the process of imposing the death penalty. First, anything less than the death penalty is ineffective to deter military members from committing serious offenses against military discipline during time of armed conflict. Second, military members are trained to kill and cannot be allowed to misuse this training. Additionally, the normal inhibition against killing generally found in civilian society is not present in the military. Finally, the exigencies of the global military and political situation may require the military to be thrust into a state of hostility under a myriad of different situations, and thus maximum flexibility is required. The first two establish a greater need for the death penalty and a special aggravating factor to be considered in imposing the death sentence; the third, a restriction on how jury discretion should be guided.

The very nature of military operations in hostilities subjects service members to the possibility and often real probability of death or serious injury. Daily service members receive orders and are required to perform duties which may ultimately result in their death. Additionally, the actions of one individual potentially have a great impact on the unit operating to accomplish a combat mission. Because of this dependence, the improper action of one soldier may cost the lives of his fellow soldiers and cause the failure of the unit mission. With so much at stake, the threat of death is essential to deter certain acts or offenses prohibited by

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[162] It is interesting to note, however, that the Court in subsequent decisions involving the military seems to tacitly assume the continuing viability of the military death penalty. In Parker v. Levy, 417 U.S. 733, 749 (1974), the Court mentioned without further comment that one penalty provided for in the U.C.M.J. is death. Likewise, in Middendorf v. Henry, 425 U.S. 25, 31 (1976), the Court notes without reservation that "[g]eneral Courts-Martial are authorized to award any lawful sentence, including death."

[163] *See, e.g.*, Brown v. Glines, 444 U.S. 348 (1980) and the cases cited therein. Schlesinger v. Councilman, 420 U.S. 738 (1975); Parker v. Levy, 417 U.S. 733 (1974).

the U.C.M.J. A long prison sentence in a safe prison in the United States is simply not a real or feasible deterrent. When soldiers are placed in a hostile or combat environment, the death penalty is required to insure the order and discipline essential to accomplishing the mission of defending the United States.

The nature of the profession of arms dictates the training and motivation of the soldier. The ultimate purpose of any armed force is to defeat enemy forces which necessarily includes the killing of others. The process of killing is inherent in the mission, and therefore inherent in the training of the soldier, both as an individual and as a member of a unit. The soldier is not only trained in the specific skills for killing but also to be aggressive in stressful situations and to have the mental toughness to overbear the will of the enemy.[164] Training the soldier to act quickly and violently to dangerous situations adds a devastating aspect to the ability to kill. While not every soldier is a front line combatant, Vietnam taught the armed forces that there is no rear area and all soldiers must be trained to fight in any situation.

Perhaps more important for purposes of this discussion than the ability to kill or the aggressiveness engrained in the soldier is the entire orientation of the military society. The military is made up of both combatants and support personnel, but they all share a common experience. They live in a society where the possibility of killing and dying are accepted facts of life and are indeed the ultimate purpose of the organization.[165] In civilian society killing is an aberration, an act which usually stirs passions and produces public outrage. The typical citizen lives in a society where killing another is not encountered, and certainly not seriously contemplated. This experience results in a general inhibition against killing another human being. The soldier, however, lives in a different environment where death and killing are not alien concepts, but

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[164] Recently bayonet training was reinstituted within the Army. While hand-to-hand combat techniques have continuously been taught during the soldier's initial training, something is inherently different about being trained to kill one's opponent at such close range with a bayonet. In discussing the reinstitution of bayonet training, an Army publication on training focused on its impact. Johnston, *The Bayonet is Back*, The Army Trainer, vol. 1, No. 3 (Spring 1982). The quoted observation of an infantry captain is illuminating, "The troops like it and it builds *more aggressiveness into them*" (emphasis added). This remark serves to underscore the message of Army training—soldiers must be aggressive and violent to overcome the will of the enemy. The inculcation of such an attitude, coupled with the knowledge of how to kill, produces unique problems within the Army that must be addressed.

[165] This is not to say that every soldier thinks about killing or dying everyday. The routine of peacetime often obscures the possibility of death, but killing and dying are inherent in the conduct of training and operations. While the actual job performed by the service member may be removed from being a combatant, the ultimate purpose of weapons cannot be ignored.

are both accepted and acceptable.[165] There is nothing foreign or unusual about training, planning, and even finally killing another individual, whether it be carried out in hand-to-hand combat or by firing an artillery shell at a target miles away. The impact of this orientation is not diminished by the fact that the soldier's training is directed at killing enemy soldiers. The crucial aspect is that the normal inhibition against killing another, generally found in typical civilians, is not present in the soldier. The total or even partial removal of these inhibitions, coupled with the ability to kill and increased aggressiveness, create special considerations for the military capital punishment system, especially for the crime of premeditated murder. These considerations are infused in the court-martial process and represent inherent aggravating factors for all murder offenses. They justify the death penalty for premeditated murder to deter soldiers from abusing their training and help reintroduce inhibitions against the taking of another life.

The instability of military society directly impacts upon the procedures of any military capital punishment scheme. Unlike civilian society that is in a fixed geographic location with a rather fixed societal structure, the military is always in a state of flux and readiness. The instability of international relations in various parts of the world require the armed forces to be ready to respond almost instantaneously to threats to the United States. The military must be able to transition rapidly from a peacetime, garrison environment to any level of hostilities from a limited show of force to general war.[167] Within the last three decades the military has found itself inserted into situations as varied as Lebanon, Vietnam, Korea, and the Dominican Republic. The military justice system must be adaptable and must be able to deal with various situations during the transition from peacetime to hostilities. Recent history has taught us that this transition must be accomplished in hours, not the weeks and months which this nation experienced earlier in this century. As the circumstances change, the aggravating factors change that would necessitate the imposition of the death sentence. Any attempt at creat-

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[165] The concept of killing another is acceptable only when justified in time of war or under other defined circumstances. *See, e.g.*, U.S. Dep't of Army, Reg. No. 190-28, Use of Force by Personnel Engaged in Law Enforcement and Security Duties (1 August 1980). The critical point, however, is that under some circumstances the act of killing another is acceptable.

[167] Official Army doctrine states:

> The anytime-anywhere aspect of Army doctrine calls for instant readiness for combat, plus . . . the ability to move rapidly to the scene of action.
>
> . . .
>
> . . . Flexibility must be the hallmark of an Army which can exclude no continent from its plan for dealing with aggression.

The Department of Defense Manual 1980, at 1-12.

ing narrow and limiting aggravating factors for the death penalty ignores the reality of the flexible military environment.[168] Thus greater emphasis must be placed on other methods of controlling the sentences to death to insure that there is not a substantial risk of arbitrariness or caprice in the imposition of the death penalty while allowing individualization of the sentence.

IV. THE DEATH PENALTY PROVISIONS OF THE U.C.M.J.

The U.C.M.J. contains thirteen articles which provide for the imposition of the death sentence, twelve on an optional basis and one on a mandatory basis. The articles can generally be broken into two groups, purely military offenses and the traditional common law offenses of premeditated and felony murder and rape. Of the military offenses, six are optionally punishable by death in time of peace or war: mutiny, attempted mutiny, or sedition; [169] misbehavior before the enemy; [170] subordinate compelling surrender; [171] forcing a safeguard;[172] aiding the enemy; [173] and improper hazarding of a vessel.[174] In time of war, four military offenses are optionally punishable by death: desertion; [175] assault upon or the willful disobedience of a lawful command of a superior commissioned officer; [176] improper use of a countersign; [177] and misbehavior of a sentinel.[178] Spying [179] in time of war carries with it a mandatory death sentence. All of the military offenses relate directly to the maintenance of good order and discipline within the context of the armed forces performing their mission as a fighting force.

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[168] Any attempt at creating aggravating factors to deal with such an array of potential situations would most likely result in very general factors. Such broadly worded aggravating factors would be subject to attack in the same way that one of Georgia's aggravating factors was successfully challenged in Godfrey v. Georgia, 446 U.S. 420 (1980). There the Supreme Court found that a Georgia aggravating factor, "outrageously or wantonly vile, horrible or inhuman in that it [the murder] involved torture, depravity of mind, or an aggravated battery to the victim," was unconstitutionally vague and resulted in no real guidance to the jury. *Id.* at 428–433.

[169] U.C.M.J. art. 94.

[170] U.C.M.J. art. 91.

[171] U.C.M.J. art. 100.

[172] U.C.M.J. art. 102.

[173] U.C.M.J. art. 104.

[174] U.C.M.J. art. 110.

[175] U.C.M.J. art. 85.

[176] U.C.M.J. art. 90.

[177] U.C.M.J. art. 101.

[178] U.C.M.J. art. 113.

[179] U.C.M.J. art. 106. The mandatory portion of this article may be invalid based upon Roberts v. Louisiana, 428 U.S. 325 (1970) and Woodson v. North Carolina, 428 U.S. 280 (1976).

The U.C.M.J. makes punishable as a capital offense the common law crime of rape; however, the decision of the Supreme Court in *Coker v. Georgia* [180] seems dispositive of the issue of the death penalty for the rape of an adult female. The U.C.M.J. authorizes the death penalty for two traditional forms of murder, premeditated murder and murder while engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.[181] The only other authorized punishment for these offenses is life imprisonment.[182] For convenience of discussion the latter category of murder will be referred to as felony murder, although the U.C.M.J. restricts application to the perpetration of the five enumerated felonies.[183]

The U.C.M.J. also provides for special procedures and rights for capital cases. These special procedures will be detailed in conjunction with the discussion of the overall trial procedures followed in military courts-martial.

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[180] In *Coker* the Supreme Court found substance in the prohibition of the Eighth Amendment, finding that the death penalty is always excessive and disproportionate for the offense of rape of an adult female. 433 U.S. at 599 (plurality opinion). The Court reserved the question of whether this would be the case for a child. This substantive use of the Eighth Amendment is unique in the Court's modern decisions involving the death penalty. Although the Court had used an Eighth Amendment proportionality analysis as one of the bases for its opinion in Weems v. United States, 217 U.S. 349 (1910), this is the first time that it was used as the sole basis for a decision. Since the basis of the decision is substantive, it would apply uniformly throughout all legal systems of the United States. In regards to the military, there appears to be no aspects of military necessity to justify the death penalty as a viable penalty during peacetime. This might not be the case in time of war, in a hostile environment where nothing less than the potential of the death penalty could deter soldiers from committing certain offenses. Whatever the validity of the arguments for the death penalty in that particular situation, the clear impact of the decision is to invalidate the imposition of the death sentence for the rape of an adult female during peacetime.

[181] Article 118, U.C.M.J., reads as follows:

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
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> (1) has a premeditated design to kill;
> (2) intends to kill or inflict great bodily harm;
> (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard for human life; or
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that is found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

Id.

[182] *Id.*

[183] *See* note 10 *supra*.

V. THE DEATH PENALTY PROVISIONS OF THE U.C.M.J. MEET THE CONSTITUTIONAL REQUIREMENTS OF THE EIGHTH AMENDMENT

In analyzing the specific aspects of the U.C.M.J. death penalty provisions, it is difficult to force the military system to conform to either the approach taken in *Gregg* or *Jurek*. As the Court stated in *Gregg*,[184] each system must be analyzed separately and considered as a whole. Additionally, the dictates of military necessity will impact on how the military system is structured. However, for ease of comparison the military system may be considered to approximate the Texas approach, but with additional procedures and protections unique to military society.[185]

A. THE DISCRETION OF THE COURT-MARTIAL IS SUFFICIENTLY GUIDED

In analyzing the military capital punishment provisions, a division between military and traditionally common law offenses is readily apparent. Different considerations apply to each group of offenses, and they have historically been treated differently. Not until 1950 did Congress extend the military courts' jurisdiction to try soldiers in peacetime for the common law crimes of murder and rape committed within the United States.[186] As the specific question of the constitutionality of the premeditated murder provision is now before the military courts, this article will concentrate on the common law provisions. It is, however, impossible to judge the system as a whole, especially in light of *Jurek*, without considering the military crimes to some extent.[187]

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[184] *Gregg*, 428 U.S. at 195.

[185] The U.C.M.J. was modified after the decision in *Furman*, but the provisions relating to the imposition of the death penalty or capital offenses were not changed. Thus the death sentencing scheme was not passed with *Furman* or its progeny in mind. This fact should not be used to find the provisions unconstitutional because it is how the system functions that is critical, not the design or intent of the Congress.

[186] Military courts-martial have had jurisdiction to impose the death penalty for purely military offenses since the Revolutionary War. However, it was not until 1950, with the enactment of the U.C.M.J. that Congress extended to the military courts the jurisdiction to try soldiers in peacetime for the common law crimes of murder and rape within the territorial boundaries of the United States. United States v. French, 10 C.M.A. 171, 177, 27 C.M.R. 245, 251 (1959).

[187] This is not to say that the constitutionality of the military offenses are predicted upon the status of the common law offenses. Because of their separate considerations, these two groups are divisible. However, they must be considered as a group to show how these offenses are structured in such a way as to interject aggravating factors into the fact finding process.

A general relationship to military necessity is discussed, but how these military crimes specifically impact upon military order and discipline is not analyzed in depth. Likewise not discussed is whether the death penalty may be imposed for military offenses which do not necessarily or specifically involve the death of another person.

All of the military offenses authorizing the death penalty either require a state of war,[188] a state of hostilities,[189] or the jeopardizing of military discipline or mission.[190] These factors can be equated to the aggravating factors that the Supreme Court found were implied in the definition of the capital offenses in *Jurek*. Thus the military court-martial must necessarily find beyond a reasonable doubt that one of these factors occurred before a soldier faces the possibility of the death sentence. Each factor represents separate, distinct, and, unique offenses peculiar to the military. Each is justified by the requirements of discipline of a combat force, a justification that the Supreme Court and other federal courts have traditionally acknowledged and honored.[191]

The common law offenses of premeditated and felony murder are somewhat different. Each is applicable whether the nation is at peace or at war, or at any intermediate stage of hostilities. They are, however, not without limits. Felony murder under Article 118(4) is very specific in limiting its application to five named felonies. This specificity is almost identical to the second type of capital murder in the Texas statute approved in *Jurek*.[192] The military court-martial panel must find beyond a reasonable doubt that the accused committed the murder while perpetrating or attempting to perpetrate one of the named felonies and thus necessarily finds that one of these aggravating factors was present.

The most troublesome offense constitionally is that of premeditated murder, in violation of Article 118(1), where there is no aggravating factor built into the definition of the crime except for evidence of premeditation. The majority in *United States v. Matthews* [193] found that limiting the death penalty for murder to premeditated and felony murder was sufficiently analogous to the Texas statute in *Jurek* to satisfy the requirement of limiting the discretion of the sentencing body.[194] This assertion, without more, is susceptible criticism because premeditated murder, limited only by its definition, appears too broad to sufficiently

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[188] U.C.M.J. arts. 85, 90, 101, 106, 113.

[189] U.C.M.J. arts. 99, 100, 102, 104 (necessarily implied).

[190] U.C.M.J. art. 94 (mutiny), art. 110 (improper hazarding of a vessel).

[191] In a speech concerning the Bill of Rights and the Military, Chief Justice Warren analyzed the relationship of the Supreme Court and the military. He found that in time of war the Court has, and must necessarily give extraordinary deference to claims of military necessity because of the basic and essential mission of the military to defend the United States. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 191-92 (1962).

[192] *See* note 66, *supra*.

[193] 13 M.J. 501 (A.C.M.R. 1982).

[194] *Id.* at 526. The decision also stressed the other procedural safeguards found in a military capital trial; however, the requirement of limiting the discretion of the sentencing body is found to be satisfied by the "limited" number of capital offenses. The dissenting opinion of Senior Judge Jones, joined by Judge Hanft, takes the majority to task on this point, 13 M.J. at 541-2 (Jones, J., dissenting).

limit the discretion of the court-martial panel.[195] This, of course, presupposes that the other aspects of the system do not, by themselves, sufficiently protect against the danger of arbitrary and capricious imposition of the death penalty. Considering the question of limiting discretion, however, a shift in focus may provide a better understanding of how the court-martial panel's discretion is limited.

The requirement of providing guidance to the sentencing body and limiting its discretion operates to reduce arbitrary and capricious sentencing by essentially limiting the group of defendants subject to the death penalty.[196] This limiting process is based upon the lawmaker's decision that certain offenses warrant the ultimate sanction and helps insure some rational basis for the decision to impose death. The population of the group subject to the death penalty by a military courts-martial is initially defined by the requirements of personal and subject matter jurisdiction. To understand how these factors interact, it must be considered that generally a person is subject to the death penalty only if he or she violates the state or federal law for which the statutory penalty is death. State law jurisdiction is essentially based upon territorial considerations. Federal law is more complex, involving considerations of status, the crime, and territorial factors. Federal law includes some common law offenses,[197] though most of the federal capital offenses deal

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[195] While both the Georgia (Ga. Code Ann. § 26-1101(a) (1972)) and the Florida (Fla. Stat. Ann. § 782.04(1)(a) (Supp. 1976-1977)) statutes considered by the Court in 1976 contain similarly broad definitions of capital murder, the discretion of the sentencing body was limited by the finding of aggravating factors. Only in the Texas statute considered in *Jurek* is the discretion limited at the findings stage. 428 U.S. at 273-74. In that statute, only five specific types of murder are punishable by death: murder of a police officer or fireman; murder committed while committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson; murder for hire; murder committed during a prison escape; and murder of a prison official by an inmate. Tex. Penal Code § 19.02(a) (1973). The *Jurek* case found that these narrowly defined types of capital murder in fact incorporated many of the aggravating factors utilized in the Georgia and Florida statutes. 428 U.S. at 270 (plurality opinion). The military premeditated murder offense is not so narrowly defined and does not appear to sufficiently limit discretion by definition alone.

Whether Articles 118(1) and 118(4), U.C.M.J. sufficiently narrow and guide the discretion of the court-martial panel is the crucial question in any conventional analysis of the military capital punishment procedures. As shown above, the majority's simple analogy to the Texas statute in *Jurek* is questionable on the surface. However, when the impact of *Lockett* is analyzed, the requirements for limiting and guiding the jury's discretion are modified. Only when these reduced requirements are applied to the military and considered in conjunction with the aggravating factors infused at the jurisdictional stage are the constitutional standards met. A traditional analysis without considering these factors would most probably find the military system constitutionally defective.

[196] *See* note 116 *supra*.

[197] Federal statutes recognize the following common law crimes when committed within the "special maritime and territorial jurisdiction of the United States": arson (18 U.S.C. § 81), assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), theft (18 U.S.C. § 661), receiving stolen property (18 U.S.C. § 662), murder (18 U.S.C. § 1111), manslaughter (18 U.S.C. § 1112), rape (18 U.S.C. § 7031), carnal knowledge (18 U.S.C. § 2032), and rob-

with particular areas [198] such as aircraft piracy. Since the military's inception Congress has authorized the death penalty for military offenses.[199] The common law offenses of murder and rape were only grudgingly added later to the military court system.[200] However, this authority is granted only if two jurisdictional elements are present: personal jurisdiction and service connection. By carving out this special group from the larger group of federal offenders, Congress has limited the court-martial panel's discretion. Both of these jurisdictional factors must be established before the court-martial may proceed and the accused can be sentenced to death.

The court-martial must have personal jurisdiction over the service member.[201] In order to be triable by court-martial the individual must be a service member, and, as such, the service member has a special status which has consistently been recognized by federal courts as different from civilian status. This special status, encompassing the special training and motivation discussed earlier, is abused whenever the soldier knowingly, intentionally, and illegally kills another person who is not the enemy.[202] This abuse must, of necessity, be found whenever a court-

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bery (18 U.S.C. § 2111). The term "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7 and essentially encompasses land owned or otherwise acquired by the United States. This would include military installations, arsenals, etc.

[198] *E.g.*, 18 U.S.C. § 34 (destruction of aircraft or motor vehicle facilities which result in death); 18 U.S.C. § 351(a) (assassination of member or member elect of Congress); 18 U.S.C. § 844(d) and (f) (explosive substance offenses which result in death); 18 U.S.C. § 1751 (assassination of a President or Vice President); 18 U.S.C. § 1992 (train wrecking which results in death when the train is in interstate or foreign commerce); 49 U.S.C. § 1472(i) (aircraft piracy).

[199] American Articles of War of 1775, Appendix IX, Winthrop, *Military Law and Precedent*, at 953.

[200] Congress first authorized the trial of common law violent crimes, including rape and murder by courts-martial in 1874. Article 58, American Articles of War of 1874. The jurisdiction to try these offenses existed only in time of war, insurrection, or rebellion and the authorized punishment depended upon the laws of the state, territory, or district in which the crime was committed. *Id*. In time of peace the military authorities were required to turn over a soldier accused of a capital offense to the civil authorities for trial. *Id*., Article 59. In 1916, Congress expanded the authority of courts-martial to try common law capital offenses by authorizing trial for murder or rape when committed in peacetime outside the boundaries of the United States. Article 92, American Articles of War, revised in the Appropriation Act of 1916, 39 Stat. 619-70, 644 (1916). In 1950, with the enactment of the U.C.M.J., the military was authorized to try these capital offenses in peacetime within the territorial boundaries of the United States. U.C.M.J. arts. 118 and 120.

[201] *See* Toth v. Quarles, 350 U.S. 11 (1955); *In re* Grimley, 137 U.S. 147 (1890); *Cf*. Grisham v. Hagan, 361 U.S. 278 (1960) (no court-martial jurisdiction over any Army civilian employee for a capital offense committed overseas during peacetime); Reid v. Covert, 354 U.S. 1 (1957) (no jurisdiction over dependent wife of a serviceman for a capital offense committed overseas).

[202] *See In re* Grimley, 137 U.S. 147 (1890).

[203] The soldier may also be guilty of murder of an enemy soldier where the killing is unlawful under either military law or international law.

martial convicts a service member of premeditated murder. The military must also affirmatively allege and prove service connection before an offense may be tried by court-martial.[204] This service connection demonstrates a substantial link to military society and the forces that make it an ordered, disciplined fighting force.[205] Only after these factors are established may the court-martial decide whether to impose death.[206]

To understand how these jurisdictional factors infuse aggravating factors for the offense of premeditated murder, the status of the accused and the possible victims must be examined. In civilian society there are any number of relationships that may exist between the murderer and the victim. Various state statutes that have been found constitutional by the Supreme Court have recognized that the status of the murderer or the victim may justify the imposition of the death penalty. Georgia authorizes the death penalty for the murderer of a peace officer killed while performing his duty.[207] Likewise, Texas authorizes the death penalty where a prisoner murders someone during an escape attempt.[208] In a military court-martial for the offense of premeditated murder, two general relationships must always exist. The accused must necessarily be a soldier due to the personal jurisdiction requirement,[209] and the victim must be either a civilian or another military member. Because of the special needs and status of military society these relationships define aggravating factors when premeditated murder is committed under circumstances involving service connection.

When a soldier murders another soldier under circumstances involving service connection the offense tears at the very fabric of military society. The military environment requires a special bond of trust and understanding between soldiers. Military order and discipline mandate that soldiers be able to work together to accomplish a common objective; their very lives depend on their compatriots. The murder of one soldier by another is not only an abuse of the soldier's training but also under-

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[204] *See* Schlesinger v. Councilman, 420 U.S. 738 (1975); O'Callahan v. Parker, 395 U.S. 258 (1969).

[205] *See* Relford v. United States Disciplinary Commandant, 401 U.S. 355 (1971).

[206] The government is required to affirmatively allege and prove the jurisdictional factors that it is relying on to establish this service connection. United States v. Alef, 3 M.J. 414 (C.M.A. 1977).

[207] Ga. Code Ann. § 27-2534.1(b)(8) (Supp. 1975). The Georgia code recognizes that the status of the murderer may also be an aggravating factor. *See, e.g., id.* at § 27-2534.1(b)(1) (Supp. 1975) (murderer had a prior record of conviction for a capital offense).

[208] Tex. Penal Code, art. 1257(b)(4) (1973).

[209] Articles 2(a)(8) and (10), U.C.M.J. extend court-martial jurisdiction to several classes of persons who are not members of the armed forces (*e.g.*, in time of war, persons serving with or accompanying an armed force in the field). These, however, are very limited exceptions that have very rarely been invoked, and therefore do not detract from the considerations discussed in the text.

mines the discipline essential to any fighting force. It is a breach of the code of the soldier that necessitates the possibility of the death penalty.

When the victim is a civilian more fundamental concepts are involved. The armed forces of the United States were created not to rule or prey upon citizens, but to protect them. American society justifiably looks upon the armed forces as a shield to protect society and the individual citizen. A soldier cannot be allowed to abuse this position by murdering a civilian, especially where the civilian is typically not trained to defend himself. Such a murder destroys the trust relationship between civilian society and the military, a relationship which is a cornerstone of our system of government.

Guidance and limitation of discretion is imposed upon the court-martial process, even when the offense is premeditated murder, by the combination of several factors. The definition of premeditated murder guides the court-martial by focusing on the crucial element of conscious intent to commit the murder. The discretion of the court-martial is limited by the infusion of aggravating factors when the required jurisdictional elements are established, which necessarily involve the special status of the military accused and his relationship to the victim. The requirements of the *Gregg* and *Jurek* line of cases are therefore satisfied for the military crime of premeditated murder. This position is further strengthened when the *Lockett* rationale and its ramifications are applied.

1. Pretrial Protections

The military accused in a general court-martial enjoys strong pretrial procedural protections. Unlike the civilian prosecutor who has wide discretion in deciding who will be charged with a capital offense,[210] the military convening authority receives the benefit of a thorough and impartial investigation and several recommendations before making a decision to refer a case to trial as a capital offense. The military accused has the benefit of an Article 32 investigation, extremely broad discovery provisions, and the early availability of counsel to assist in effectively preparing for trial.[211] The staff judge advocate must submit a report to the con-

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[210] See *Gregg*, 428 U.S. at 199 (plurality opinion).

[211] *See* U.C.M.J. art. 32; Paragraph 34, M.C.M. These provisions allow the accused and his counsel to be present during the investigation, cross-examine government witnesses, and present defense evidence and witnesses to the investigating officer.

The military accused in all courts-martial enjoys a right to counsel beginning at the earliest stages of the proceedings. The accused may be represented by one or more military defense counsel, either detailed by the convening authority or personally selected by the accused at the government's expense. U.C.M.J. art. 38(b). He may also retain civilian counsel at his own expense, in addition to the military counsel. *Id*. This relationship with the military counsel extends through trial and into appellate proceedings. United States v.

vening authority which details the available evidence, including available evidence in mitigation and extenuation, and the recommendations of the commanding officers who know the accused before a case may be referred capital.[212] The convening authority must affirmatively decide to refer the case to a court-martial specifically authorized to adjudge the death sentence.[213] Thus before the accused is exposed to the risk of receiving the death sentence, the convening authority, acting in an impartial, nonprosecutorial role, must find that there is nothing in the available evidence or in the character of the accused that would dictate a trial where the death sentence should not be imposed.

2. Provisions During the Trial

At trial the court-martial process includes a number of procedures and special requirements which serve to focus the sentencing body's attention on the individual circumstances of the offense and the character of the accused. These procedures and requirements increase reliability of the sentence and substantially reduce the risk of arbitrary or capricious imposition of the death sentence. The underlying difference between the military court-martial panel and the civilian jury is a prominent factor in testing the capital sentencing provisions. The unique character of the court-martial panel may alone differentiate the military scheme from constitutionally deficient civilian schemes and is apparently the basis for the framing of the issues by the majority in *Shick v. Reed*.[214]

In all capital cases the accused must be tried by a panel of court members.[215] In *Gregg* the Supreme Court praised the practice of using a jury for sentencing as a vital link between society and the trial which ties the result to the representatives of that society.[216] The military court-martial panel is selected by the convening authority on the basis of age, education, training, length of service, and judicial temperment.[217] The panel in a general court-martial case consists of either all officers or officers and enlisted service members [218] at the request of an enlisted accused.[219]

Palenius, 2 M.J. 86 (C.M.A. 1977). Additionally, when the accused's case is on review, he is assigned a military appellate defense counsel whose only function is to represent cases on review to the military appellate courts. Continuity of representation throughout the court-martial proceedings help insure that the accused is accorded his rights and all favorable information is presented.

[213] U.C.M.J. art. 34; Paragraph 35, M.C.M.

[213] Paragraph 126a, M.C.M.

[214] The position of the Court seems clear from its language ". . . does that case [*Furman*] apply to death sentences imposed by military courts *where the asserted vagaries of juries are not present* as in other criminal cases?" (emphasis added) 419 U.S. at 260.

[215] Paragraph 14a, M.C.M.

[216] *Gregg*, 428 U.S. at 192.

[217] U.C.M.J. art. 25(d)(2).

[218] U.C.M.J. art. 16(1)(B) and art. 25.

[219] U.C.M.J. art. 25(c)(1).

All service members are necessarily a part of a multi-racial, multi-ethnic society. They must work daily with members of other racial or ethnic groups as superiors, subordinates, or peers. Since the late 1960's, the armed forces have instituted programs designed to sensitize soldiers to the customs, character, and problems of other ethnic or racial groups. Soldiers are provided with literature on the subject, required to attend briefings and instructions on the subject, and exposed to various view points during discussion sessions.[220] Further, officer court members have as a minimum a baccalaureate degree and often one or more postgraduate educational degrees. All court members, regardless of rank, have been trained to fight together and taught that their lives depend upon the soldiers around them. Due to their military training, the court members are inherently predisposed to follow the instructions of the military judge both during the findings and sentencing phase of the trial. The characteristics of the service member, and thereby the court-martial panel, eliminate prejudice, insure that the elements of the offense are proven beyond a reasonable doubt during findings, and insure that only proper matters are considered during sentencing.

Finally, the military court member possesses a quality not found in the typical civilian juror. Because of their experience in command positions officer court members are experienced in weighing evidence and making the decisions required in both the findings and sentencing process.[221] In the plurality opinion in *Gregg* [222] lack of experience in making such determinations was a major justification for limitation of the jury's discretion. Additionally, the *Gregg* plurality required a strict differentiation between those who should be sentenced to live and those sentenced to die.[223] This theory was severely undercut by the rationale of *Lockett*.[224]

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[220] The Army publishes several plans and pamphlets that outline in detail the goals of the Army instructions on carrying them out. *E.g.* U.S. Dep't of Army, Pamphlet No. 600-26, *The Department of the Army Affirmative Actions Plan* (1978); U.S. Dep't of Army, Pamphlet No. 600-42, *Unit Equal Opportunity Discussion Outlines* (1977).

[221] At all levels of command, from platoon leader to division commander, an officer is required daily to evaluate information and "testimony" in the performance of his duties. This may arise in various stages of adverse administrative proceedings, nonjudicial punishment, or courts-martial. The action requires the officer to either make an evaluation and a recommendation as to disposition, or even act as the "judge and jury" in administering nonjudicial punishment under Article 15, U.C.M.J. While this is not the equivalent experience of a judge, the responsibility and skills needed to make hard decisions in sentencing and findings are generally found in military court members. Noncommissioned officers, while not usually found in command positions, have experienced the same general responsibilities in evaluating evidence and making decisions. An additional factor often found in military court members is that they have previously sat as court members on one or more occasions. This type of experience is just not found in a civilian jury and adds greatly to the military court-martial panel's effectiveness and reliability.

[222] *Gregg*, 428 U.S. 153, 192.

[223] *See id.* at 188-89.

[224] *See* note 81 and accompanying text *supra*.

The typical experience of the court-martial panel would seem to diminish the requirement for strict, detailed aggravating factors.

In a military capital case the accused may not plead guilty to an offense for which death is an authorized punishment.[225] This insures consideration on the merits of all available evidence and a finding that all elements of the narrowly defined offense, as well as inherent aggravating factors, are proven beyond a reasonable doubt. During the findings phase, the government is prohibited from introducing a deposition without the consent of the accused.[226] During the sentencing portion of the trial, the accused may receive the death penalty only by a unanimous vote of the court members.[227] This vote is taken after full and free discussion and allows any court member to veto the death penalty. This provision for unanimity of sentence is more stringent than has been required constitutionally by the Supreme Court.[228]

The above procedural protections apply only to capital cases; however, there are procedures common to all courts-martial which enhance the reliability and hence the constitutionality of the system. The most notable is that the court-martial is a bifurcated trial divided into a findings phase, where guilt or innocence is determined, and a sentencing phase, where the court members are presented aggravating and mitigating evidence and argument by both sides.[229] At both phases important procedural protections are present which meet or exceed the requirements of the Supreme Court cases. During the findings portion of all courts-martial, the panel is advised on any lesser included offenses which they can find in lieu of a conviction of the more serious offense.[230] This has been held to be a constitutional requirement of any capital sentencing scheme.[231] Most importantly, the sentencing portion of the trial focuses the court's attention on the individual character of the accused and the specific circumstances of the offense.[232] The government is more limited in presenting aggravation than their counterparts in civilian society, being restricted to utilizing the circumstances of the offense introduced in the findings phase, evidence of prior convictions of the accused with certain restrictions, and personnel records reflecting the nature of the accused's past military conduct.[233] The defense on the other hand is vir-

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[225] U.C.M.J. art. 45b.
[226] U.C.M.J. art. 49.
[227] U.C.M.J. art. 52b(1).
[228] In the Florida capital sentencing statute considered by the Court in Proffitt v. Florida, 428 U.S. 242 (1976), the jury renders an advisory opinion by majority vote to the trial judge as to the appropriate sentence. *Id.* at 248–49.
[229] Paragraphs 74 and 75, M.C.M.
[230] Paragraph 73(a), M.C.M.
[231] Beck v. Alabama, 447 U.S. 625 (1980).
[232] *See* Paragraph 76b(1), M.C.M. for the instructions to be given the court members.
[233] Paragraph 75b, M.C.M.

tually free to introduce any relevant evidence under relaxed evidentiary rules, procedures which fully comport with the rationale of *Lockett*.[234] The court members are instructed that they can consider any evidence in extenuation or mitigation as well as any evidence presented in defense in arriving at an appropriate sentence.[235] Additionally, the accused has several rights to allocution during the sentencing phase. He may make a sworn statement, choose to remain silent, make an unsworn statement either personally or through his counsel, or make a sworn and an unsworn statement.[236] If he makes an unsworn statement, he may not be cross-examined by the government, but factual assertions may be rebutted.

In summary, the actual court-martial comports with the overall rationale of the Supreme Court cases and provides greater rights and protections for the accused than are provided for his civilian counterpart. The court-martial preserves the integrity of the system, increases reliability of the sentence, and focuses the attention of the court members, thus protecting against the arbitrary and capricious imposition of the death penalty. The military capital sentencing scheme provides a realistic framework wherein the death penalty is imposed upon persons deserving of that punishment and is withheld for persons that are not. The very nature of the court-martial panel removes much of the basis for the Supreme Court objections to the death penalty.[237]

3. The Post-Trial Phase

The post-trial phase of the military justice system provides many more protections against arbitrary and capricious imposition of the death penalty than any civilian system. With the shift in the Supreme Court's emphasis from arbitrariness to individualization, the appellate review in a capital sentencing system becomes even more important.[238] The military provisions provide for a thorough, mandatory review by four distinct review authorities. At each level the findings and sentence are analyzed, especially the decision of the court members to impose the death penalty. The crime is weighed against the individual, and the sen-

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[234] Paragraph 75c(1), M.C.M.

[235] Paragraph 76b(1), M.C.M.

[236] Paragraph 75(c)(2), M.C.M.

[237] The Army Court of Military Review has rejected the application to the military of the Supreme Court cases addressing the six person jury and conviction by a nonunanimous jury. Ballew v. Georgia, 435 U.S. 223 (1978); Burch v. Louisiana, 441 U.S. 130 (1979). The Court also rejected the studies that had been relied on by the justices in *Ballew* and *Burch* because of the fundamental differences between a civilian jury and the court-martial panel. United States v. Guilford, 8 M.J. 598, 602 (A.C.M.R. 1979). Likewise, such a distinction would act to make inapposite the sociological studies which played such a large part in *Furman*.

[238] *See* note 126 and accompanying text *supra*.

tence is tested to insure that it is not disproportionate under the circumstances.[239]

After trial the convening authority receives a detailed report from the staff judge advocate which reviews and analyzes the evidence, the legal issues, and the sentence.[240] The defense may comment on this review [241] and submit any additional post-trial information, including information attacking the appropriateness of the sentence as well as petitions for clemency.[242] The convening authority can disapprove the findings or the sentence and substitute life imprisonment for the death sentence if he believes that the facts do not support the sentence.[243] This first review is by the commander who is in charge of the immediate society of which the accused is a part and insures proportionality and uniformity within that society.

After the convening authority acts, the case is scrutinized by a court of military review. At this level, the court reviews the case not only for legal error, but also conducts a factual and legal review to insure that the findings are appropriate and the sentence is not excessive.[244] Uniquely, the courts of review have the capability to determine questions of fact.[245] The Army Court of Military Review has demonstrated that it will closely scrutinize cases involving the death penalty and will not hesitate to reassess the sentence to life imprisonment if warranted by the facts.[246] The specific intent of Congress in giving the courts of review these powers was to insure uniformity in sentencing.[247]

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[239] *See, e.g.*, United States v. Washington, 11 C.M.R. 388 (A.B.M.R. 1953) and *generally*, U.C.M.J. art. 66(c).

[240] U.C.M.J. art. 61; Paragraph 85, M.C.M.

[241] United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

[242] Article 38(c), U.C.M.J. authorizes a defense counsel to submit a brief to the convening authority which may include "such matters as he feels should be considered in behalf of the accused." This brief then becomes a permanent part of the record of trial and is considered by the appellate courts. This brief can be utilized by the defense to raise questions of law and reasons that the death sentence is not appropriate. It should be noted that the defense can refer to matters outside the record of trial, such as the sentences given to co-conspirators, and can raise issues that ordinarily could not be considered by a court. For example, the convening authority is able to consider the results of polygraph examinations. United States v. Massey, 5 C.M.A. 514, 18 C.M.R. 138 (1953).

[243] U.C.M.J. art. 64.

[244] The courts of review independently consider the record and "[m]ay affirm only such findings of guilty, and the sentence or such part or amount of the sentence as it finds correct in law and in fact and determines, on the basis of the entire record, should be approved." U.C.M.J. art. 66(c).

[245] U.C.M.J. art. 66(c).

[246] United States v. Washington, 11 C.M.R. 388 (A.B.M.R. 1953).

[247] When the U.C.M.J. was passed, the drafters intended "that this power will be exercised to establish uniformity of sentences throughout the Armed Forces." Sen. Rep. No. 486, 81st Cong., 1st Sess. 28 (1949).

All death sentence cases are required by the U.C.M.J. to be reviewed by the United States Court of Military Appeals.[248] Although its powers are not as broad as the powers of the courts of review, the Court of Military Appeals makes essentially the same analysis of the propriety of the sentence and tests it for arbitrariness and caprice.[249] The court has also indicated that it will actively pursue its mandate from Congress to exercise supervisory authority over the entire military justice system.[250] At this level, the sentence is tested against like cases tried throughout the armed forces.

The U.C.M.J. requires that the President of the United States review all capital cases before the death sentence can be executed.[251] This is a much broader protection than found in the state capital punishment systems considered by the Supreme Court. The President must affirmatively approve all death sentences before they can be executed. The President serves as the final check against improper sentencing and tests this sentence in relationship to the broadest society. Furthermore, the President is in a much more neutral position than the governor of a state and is much less susceptible to undue pressure from an irate constituency.[252]

VI. CONCLUSION

The Supreme Court, or more precisely, several Supreme Court plurality opinions have charted a course in the capital punishment area that often seems contradictory. The emphasis has shifted from arbitrariness to individualization and reliability, resulting in apparent conflicts in theory and modified guidelines for analyzing capital sentencing statutes. The doctrine of *Furman* and its progeny do apply to the military, but are modified and restricted by the dictates of military necessity. In this regard, Congress, who is constitutionally empowered to make rules

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[248] U.C.M.J. art. 67(b)(1).

[249] The court can refuse to affirm sentences it believes to be arbitrary and capricious. United States v. Christopher, 13 C.M.A. 231, 236-7, 32 C.M.R. 231, 236-37 (1962).

[250] *See* McPhail v. United States, 1 M.J. 457, 462 (1976).

[251] U.C.M.J. art. 71.

[252] While the President is responsible to all citizens, he enjoys a unique relationship with the armed forces as the commander-in-chief. The members of the armed forces do not form a large percentage of the voters of the country. Likewise, the circumstances surrounding the processing of a court-martial case differ from that of a state capital case. In a state case, the circumstances of a murder, especially a gruesome one, are likely to be well publicized and will often enflame the passions of the state population. Under such circumstances, a state governor is aware of the feelings of the people and knows that his actions concerning the sentence will be closely watched. In a court-martial case, the situs of both the crime and the trial are usually far removed from Washington. There is little practical concern for the reaction of the population and their scrutiny of the President's action. Thus, the President is able to consider the case objectively and not be swayed by emotion or the fear of voter dissatisfaction with his decision.

for the armed services, balances the rights of soldiers against the special needs of the military society. The balance struck is the U.C.M.J. Constitutional requirements are satisfied by the special and routine military procedures present in the pretrial, trial, and post-trial phases of a court-martial. Sentencing discretion is limited either by aggravating factors infused at the definition stage or by the nexus required with the jurisdictional elements. The bifurcated trial, with strong procedural protections and a unique sentencing body, insures the reliability of the death sentence. Finally, a thorough, detailed appellate review protects against arbitrariness or caprice.

The military system is not without its faults, and it does not neatly fit within either one of the two models found constitutional by the Supreme Court. If the U.C.M.J. death penalty provisions had been analyzed utilizing the capital punishment cases decided prior to 1978, they may well have been found unconstitutional. However, *Lockett* and its progeny have shifted the emphasis and have apparently changed the theoretical underpinnings of the entire capital punishment area. In an area repleat with plurality opinions and conflicts of theory, it is highly questionable, if not totally illogical, to analyze a capital punishment system by precise reference to any specific plurality opinion. The more prudent approach is to analyze the system as a whole using basic principles that underlie all of the opinions. When the U.C.M.J. is analyzed in this manner, desirable improvements may be identified, but it is not unconstitutional. As a whole, the military capital sentencing system employs interlocking protections that meet and often exceed the constitutional requirements of the Eighth Amendment.

BOOK REVIEW

A UNIFORM SYSTEM OF CITATION, THIRTEENTH EDITION*

Harvard Law Review Association, *A Uniform System of Citation, Thirteenth Edition.* Cambridge, Massachusetts: Harvard Law Review Association, 1981. Pages: xii, 237. Published and distributed by The Harvard Law Review Association, Gannett House, Cambridge, Massachusetts 02138.

Reviewed by Colonel William S. Fulton, Jr. **

A delay of several months in the arrival of the 13th edition of *A Uniform System of Citation,* published by The Harvard Law Review Association for a consortium of law reviews (The Columbia Law Review, The Harvard Law Review Association, The University of Pennsylvania Law Review, and The Yale Law Journal), was worth the wait; this small volume contains some pleasant surprises.

Most noticeable to those of us who have been poring over earlier editions through bifocals is a new and larger typeface. With the more readable print has come not only a larger page, but a spiral binding. At last the volume will lie flat, remaining open while one returns to the typewriter. This author's copy of the previous edition could overcome any normal paperweight and spring shut even from an open, facedown position.

No less welcome than these physical improvements are some of the substantive changes from the last edition, published almost six years ago. A summary of changes, itself an innovation, precedes the table of contents. Those changes which seem most significant for writers of military trial or appellate briefs and judicial opinions, or legal memoranda for persnickety staff judge advocates, will be discussed in the paragraphs to follow. Also, for those military offices inclined to adopt *A Uniform System of Citation* for their own uses, I shall mention some elaborations or variations that ought to be considered.

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*The opinions and conclusions presented in this book review, and in the book itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

**Judge Advocate General's Corps, U.S. Army. Senior Judge, U.S. Army Court of Military Review. In 1961, the author prepared a military citation manual for use in the thesis program at The Judge Advocate General's School, U.S. Army, based on *A Uniform System of Citation, Tenth Edition.*

Introductory signals can be a source of bewilderment to occasional writers. Yet, when properly used, they require the writer and enable the reader to evaluate the relative support for a proposition. The introductory signal *"see also"* has been given a new meaning (just as we finally grasped the old one). Instead of merely indicating material that supports an analogous proposition, *"see also"* must now herald material that, in addition to other directly supportive authorities, supports the proposition in the text. This places *"see also" squarely between "see"* (or "no signal") and *"cf."* Too bad such strengthening of an introductory signal cannot be given retroactive effect so as to add weight to the author's past writings.

A parenthetical explanation of the relevance of cited material, other than material directly supporting or directly contrary, is helpful to the reader. The previous edition was the first to indicate that an explanatory parenthetical should accompany any citation introduced by *"cf."* or *"but cf."* The new edition continues that policy, strongly recommending the use of parentheticals with those signals and with the *"compare . . . with"* form, and now also encourages their use for material introduced by *"see also"* and *"see generally."*

Not so warmly welcome is one matter having to do with citation clauses, the citation clause being one that is allowed to intrude into a text sentence for the purpose of citing authority pertaining to only a portion of the sentence. (In law reviews, this takes the form of a midsentence numeral indicating a footnote—an interruption only slightly less grave.) The 13th edition now tells us that it is permissible to mix citation signals of opposing types (e.g., *"see"* with *"but see"* or *"contra"*) within a single citation clause. Mixing signals, whether of different types or not, can only mean one thing, longer interruptions of sentences by citation clauses. The writer who takes advantage of this annoyance deserves to go unread.

The essential ordering of various authorities within a citation string has been subject to a sometimes overlooked exception: if one authority is considerably more helpful or authoritative, it may precede the other regardless of citation rank. Otherwise, one should cite cases before constitutions, constitutions before statutes, and so on. Within the 13th edition's hierarchy of cases, Court of Military Appeals decisions still rank below those of the federal district courts and Court of Claims. It is at least some comfort to know that, along with decisions of the Court of Customs and Patent Appeals (subsequently merged into the United States Court of Appeals for the Federal Circuit) and certain other courts, they rank above the decisions of bankruptcy panels and bankruptcy judges. The Courts of Military Review, alas, remain unrecognized in the ordering of authorities. Perhaps the next edition will repair the over-

sight. On the other hand, perhaps we should leave well enough alone since we can do no better than cite them immediately after Court of Military Appeals decisions with one's own service court first and the others in alphabetical order by courts, as we do now. Within this ordering of authorities in a citation string, rules of evidence and procedure now have moved up so as to follow statutes in force (federal or state, as the case may be) instead of being relegated to the administrative and executive materials, as in earlier editions. Secondary materials come last, with the book reviewer's work occupying nearly the lowest place of all.

Shortened citation forms, although hailed by writers, can send the serious reader leafing hastily through preceding pages to identify the source so that it may be jotted down and located in a library. The rules governing short citation forms have been revised extensively according to the publishers of the 13th edition. The principal change, however, appears to be in the inclusion of many helpful examples of the correct usage of *"id."*, *"supra"*, and *"hereinafter."* Brief-writers in particular (appellate counsel take heed) are cautioned that, when *"supra"* is used, the exact page on which the authority was previously cited in full must be given, as in "Winthrop, *supra* p. 3, at 95." Indeed, all potential *"supra"* abusers should note that *"supra"* always must be followed by a previous page or footnote number in the citing material.

A particular uncertainty that has surrounded *"supra"* has been whether to use it when citing cases. *A Uniform System of Citation* does not authorize *"supra"* when citing cases, constitutions, or statutes, except in extraordinary circumstances. Specific alternative short forms for repeating case citations, such as the use of a party's name, *"O'Callahan,"* or repeating only a volume and page, "12 M.J. at 197," obviate the need to use *"supra"* in most instances. If the practices of a particular office, agency, or court nevertheless permit *"supra"* to be used when citing cases, its use should be restricted to those instances in which the previous full citation is not more than a page or two away. *See* M. Price, *A Practical Manual of Standard Legal Citations* 61-62 (1958). An earlier edition of Price's manual was adopted and widely issued throughout the Corps. This may account for our institutional tendency to use *"supra"* for cases. Stamping out the practice is somewhat like riding a lawn of crabgrass—best done before the seeds sprout. Perhaps, therefore, The Judge Advocate General's School should institute Basic Course practical exercises emphasizing the nonuse of *"supra"* for citing cases.

Inside the front cover of the new edition of *A Uniform System of Citation,* one finds a handy selection of the most commonly used citation forms. They are arranged on two pages so as to distinguish the brief and memoranda style (without footnotes) from the law review footnote style. Inside the back cover, some frequent abbreviations are found. Another

improvement is the expanded section on citing uniform acts, model codes, rules of evidence and procedure, restatements, and American Bar Association Standards and other A.B.A. materials. As previously stated, this edition, although delayed in the final production, was well worth waiting for.

The rules set forth in *A Uniform System of Citation* are neither all-inclusive nor intended to be inflexible. The increased frequency with which some particular materials are cited in military legal writing or the form in which some materials are found, or not found, in Army field law libraries indicates that some variations may be necessary. As in the case of the Model Code of Professional Responsibility in the field of ethics, a particular citation system is not binding except when adopted by someone with authority to enforce it, such as law review editors, graders of student work, or judicial rule-makers. Those who adopt the 13th edition of *A Uniform System of Citation* for military law use profitably could make some decisions such as the following:

a. Cite Army Regulations in the abbreviated style authorized for Treasury Regulations: Army Reg. 27-10, para. 1-1 (1968). Amended matter can be cited to the latest material in which the relevant language is found: Army Reg. 27-10, Change 21, para. 2-28 (1981). Any essential information as to the exact effective date in relation to the facts under discussion can be indicated in an explanatory parenthetical.

b. Similarly, although Manuals for Courts-Martial can be cited as Executive Orders, and should be so cited initially in scholarly works, for most purposes a court-martial manual need be cited only by its official designation: Manual for Courts-Martial, United States, 1969 (Revised edition), para. 8. Amended matter can be cited as follows: Manual for Courts-Martial, United States, 1969 (Revised edition), Change 3, para. 24*a* (1980).

c. Cite the Uniform Code of Military Justice in an abbreviated style as authorized for the Internal Revenue Code. However, since the Uniform Code of Military Justice, unlike the I.R.C., is not itself a separate title of the United States Code, include a citation to U.S.C., U.S.C.A., or U.S.C.S., as available: U.C.M.J. art. 134, 10 U.S.C. § 934 (1976); U.C.M.J. art. 2, 10 U.S.C.A. § 802 (West 1975 & Supp. 1981).

d. Cite current Military Rules of Evidence as follows even though they are a part of the Manual for Courts-Martial: Mil. R. Evid. 301(a).

e. Informational Army publications, such as Department of the Army Pamphlets, should be cited in the manner indicated for other books and pamphlets: U.S. Dep't of Army, Pamphlet No. 27-9, Military Judges Guide, Change 1, p. 4-59 (1969) (hyphenated page numbers may be indicated by "p." to avoid ambiguity).

f. If *A Uniform System of Citation* is adopted, variances ought to be kept to a minimum. On that basis, decisions of the Court of Military Appeals prior to West's Military Justice Reporter should be cited using the abbreviation "C.M.A.," rather than "U.S.C.M.A.," for the court's official reporter despite the court's own preference, expressed in connection with the 12th edition, for the longer abbreviation "U.S.C.M.A.": United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969). (The court nevertheless uses "C.M.A." as its abbreviation in citing current decisions: United States v. Anderson, 12 M.J. 195 (C.M.A. 1982)).

g. The previous edition illustrated a special citation form for published Board of Review decisions under the Articles of War. Now instead of that special form, the 13th edition only advises citing to the official reporter for pre-U.C.M.J. cases. On that basis, the following forms are proper: United States v. Rabb, 81 B.R. 77 (A.B.R. 1948); United States v. Skuczas, 29 B.R. (E.T.O.) 7 (A.B.R. 1945); United States v. Turner, 11 B.R.-J.C. 261 (A.J.C. 1951).

h. *A Uniform System of Citation* does not prescribe parallel citations for Supreme Court cases. Nevertheless, citing to parallel sources can be very helpful when the readily available library facilities are intensively used and include more than one reporter, or (as when the intended reader is a traveling trial judge) various libraries might be used. On the other hand, even though the publishers recommend that state cases be cited both to the official state reports and to elements of West's National Reporter System, few Army Law libraries include the official state reports except possibly those of the particular state in which the library is located. This suggests that parallel citation of state cases need not be required. There is even a question whether parallel citation of Court of Military Appeals decisions (1951-1975) is truly necessary. However, there may be some libraries that have only the official reporter (C.M.A.), and there is some material in C.M.A. that is not found in C.M.R., for which it will always be necessary to continue citing C.M.A.

The examples above deal mainly with military criminal law. Although bearing in mind that the fewer variations from a supposedly uniform system the better, there nevertheless can be found similar citation exigencies in the fields of government contract and contract appeals law and in general military administrative law. The objective is to completely identify the source material so that it readily may be located and examined. However, for the benefit of civilian researchers as well as ourselves, it also is well when devising special citation forms to avoid the overabundant use of acronyms and jargon that has plagued military legal writing.

Uniform rules of citation facilitate, rather than obstruct, communication. Even those of us who attended less ivied (and ivoried) towers, can

be grateful for the work of the Harvard editors and their compatriots. They have even foreshadowed the future of legal research, explaining in their Rule 10.8.1 that

> If an unreported case is available on a computerized legal research service, indicate that fact parenthetically:
>
> > Ostergaard v. DeMarco, No. 86-127 (D. Wyo. Aug. 7, 1987) (available Oct. 1, 1987, on LEXIS, Genfed library, Dist file).

In conclusion, one may again tell a book by its cover: in its 13th edition, the famed "Bluebook" has returned to blue covers, and with a thumb index besides.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, tapes and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review of the *Military Law Review*.

Notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section II, Authors or Editors of Publications Noted, and in Section III, Titles Noted, the number in parentheses following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section II.

The opinions and conclusions expressed in the notes in Section IV are those of the editor of the *Military Law Review*. They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

II. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Aaron, Henry J., editor, *The Value-Added Tax: Lessons from Europe* (No. 1).

American Society of Hospital Pharmacists, *Consumer Drug Digest* (No. 2).

Collins, Michael P., and Philip F. Postlewaite, *International Individual Taxation* (No. 10).

English, John A., Major, *A Perspective on Infantry* (No. 3).

Federal Legal Information Through Electronics (FLITE), *KWIC Index to Comptroller General Decisions* (No. 4).

Guelff, Richard, and Adam Roberts, editors, *Documents on the Laws of War* (No. 11).

Jasani, Bhupendra, editor, and Stockholm International Peace Research Institute, *Outer Space—A New Dimension of the Arms Race* (No. 13).

Levy, Herbert Monte, *How to Handle an Appeal* (2d ed.) (No. 5).

Murphy, Bruce Allen, *The Brandeis/Frankfurter Connection,* (No. 6).

Murray, Douglas J., and Paul R. Viotti, *The Defense Policies of Nations, A Comparative Study* (No. 7).

Myers, Henry A., *Medieval Kingship* (No. 8).

O'Brien, William V., *The Conduct of Just and Limited War* (No. 9).

Postlewaite, Philip F., and Michael P. Collins, *International Individual Taxation* (No. 10).

Roberts, Adam, and Richard Guelff, editors, *Documents on the Laws of War* (No. 11).

Snyder, Louis L., editor, *Hitler's Third Reich: A Documentary History* (No. 12).

Stockholm International Peace Research Institute and Bhupendra Jasani editor, *Outer Space—A New Dimension of the Arms Race* (No. 13).

Viotti, Paul R., and Douglas J. Murray, *The Defense Policies of Nations, A Comparative Study* (No. 7).

Von Ward, Paul, *Dismantling the Pyramid: Government by the People* (No. 14).

Young, Warren L., *Minorities and the Military, A Cross-National Study In World Perspective* (No. 15).

III. TITLES NOTED

Brandeis/Frankfurter Connection, The, *by Bruce Allen Murphy* (No. 6).

Conduct of Just and Limited War, The, *by William V. O'Brien* (No. 9.)

Consumer Drug Digest, *by American Society of Hospital Pharmacists,* (No. 2).

Defense Policies of Nations, A Comparative Study, The, *by Douglas J. Murray and Paul R. Viotti* (No. 7).

Dismantling the Pyramid: Government by the People, *by Paul Von Ward* (No. 14).

Documents on the Laws of War, *edited by Adam Roberts and Richard Guelff* (No. 11).

Hitler's Third Reich: A Documentary History, *edited by Louis L. Snyder* (No. 12).

How to Handle an Appeal, *by Herbert Monte Levy* (2d ed.) (No. 5).

KWIC Index to Comptroller General Decisions, *by Federal Legal Information Through Electronics (FLITE)* (No. 4).

International Individual Taxation, *by Phillip F. Postlewaite and Michael P. Collins* (No. 10).

Medieval Kingship, *by Henry A. Myers* (No. 8).
Minorities and the Military, A Cross-National Study in World Perspective, *by Warren L. Young* (No. 15).
Outer Space—A New Dimension of the Arms Race, *Stockholm International Peace Research Institute and edited by Bhupendra Jasani* (No. 13).
Perspective on Infantry, A, *by Major John A. English* (No. 3).
Value-Added Tax: Lessons from Europe, The, *edited by Henry J. Aaron* (No. 1).

IV. PUBLICATION NOTES

1. Aaron, Henry J., editor, *The Value-Added Tax: Lessons from Europe*. Washington, D.C.: The Brookings Institution, 1981. Pages: xi, 107. Price: $10.95, hardcover; $4.95, paperback. List of conferences participants, index. Publisher's address: Director of Publications, The Brookings Institution, 1775 Massachusetts Ave., N.W., Washington, D.C. 20036.

Tax reform is a subject of perennial political interest at all levels of American government. "Reform" means many things to many people, but one concrete proposal that has received considerable attention in Congress is the possibility of enacting a value-added tax, such as is used in most of the countries of Western Europe.

"Value-added" is defined as "the difference between the value of a firm's sales and the value of the purchased material inputs used in producing goods sold." The value-added tax is levied on this difference. The firm pays the tax but passes the burden along to the consumer of the goods sold. The value-added tax is loosely analogous with a sales tax. The book here noted describes the experience of various European countries with the value-added tax: France, which first implemented the tax in 1954, Italy, the Netherlands, Sweden, the United Kingdom, and Germany. The various contributors to the volume express skepticism concerning the usefulness of the value-added tax in the American governmental system.

The book is a collection of essays. After an introduction and summary by the editor, six chapters or essays describe the operation of the tax in the six countries listed above. All are authored by scholars and tax officials from the countries in question. They and others were participants in a Brookings-sponsored conference of tax experts which took place in October 1980.

Reader aids include a detailed table of contents, explanatory foreword, and subject-matter index. Many footnotes and statistical tables are provided.

The editor, Mr. Aaron, is affiliated with the Brookings Institution, which describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally."

2. American Society of Hospital Pharmacists, *Consumer Drug Digest.* New York, New York: Facts On File, Inc., 1982. Pages: xvi, 477. Price: $19.95, hardcover; $9.95, paperback. Appendix of Canadian brand names, glossary, index. Publisher's address: Facts on File Publications, 460 Park Ave. South, New York, N.Y. 10016, tel. (212) 683-2244.

The American public has become much more aware in recent years of the need to be informed about the nature and complete effects of the large volume of common pharmaceuticals, both prescription and nonprescription, that are ingested every.day. Additionally, the high price of many drugs has induced many consumers to look for less expensive ways of filling their pharmaceutical requirements. These needs have stimulated the preparation of the work here noted, a compact encyclopedia of dozens of frequently used drugs.

The book is organized in eighteen unnumbered chapters dealing with various diseases or types of problems for which drugs are commonly taken. Typical titles include, "Infections," "Skin Problems," "Arthritis," "Sleep Disturbances," and many others. Each chapter has its own table of contents, listing subtopics and particular drugs discussed. An essay one or two pages in length describes each drug, including brand names, purposes, undesired effects, precautions to be taken, and dosage and storage of the drug.

The book offers a table of contents, an explanatory introduction, an appendix listing Canadian brand names for the drugs described, a short glossary of technical terms used, and a subject-matter index.

3. English, John A., Major, *A Perspective on Infantry.* New York, N.Y.: Praeger Publishers, 1981. Pages: xxi, 345. Price: $29.95. Bibliography, index. Publisher's address: Praeger Publishers, Div. of CBS, Inc., 521 Fifth Ave., New York, N.Y. 10175.

Judge advocates usually know little about purely military topics, such as infantry unit tactics, unless they have had prior service in another branch. The book here noted is well suited to fill that gap. Written in a highly readable style, this work explains the history and evolution of infantry tactics in this century, concentrating on the First and Second World Wars. The tactics of the German army are considered at length. Some mention is made of Israeli tactics and also the Korean War.

The book is organized in nine chapters, describing the role of infantry under the conditions peculiar to specified campaigns or geographic regions. In his final chapter, the author concludes, among other things, that infantry continues to play a highly important role in warfare and that decentralization of tactical control of forces has been critical to success in many cases. He offers recommendations for realistic battle-oriented training for units and individuals. The author states, "Using ground principally to gain security from enemy fire and to attain surprise, the primary role of infantry remains to disrupt, psychologically dislocate, and disorganize enemy resistance in preparing the way for a decision." (p. 289).

The book offers an explanatory foreword, preface, and prologue. A table of contents, list of maps and statistical tables, and list of abbreviations are provided. The work is extensively footnoted, and notes are collected together at the end of each chapter. The volume concludes with a bibliography and a subject-matter index.

The author is an infantry major in the Canadian Army. At time of publication he was serving as a staff officer at the National Defence Headquarters, Ottawa, Canada. He has had extensive foreign service with the Canadian and British armies, and has published a number of articles on military subjects. He holds a B.A. and an M.A. from the Royal Military College of Canada, and an M.A. from Duke University, specializing in military history and related studies.

4. Federal Legal Information Through Electronics (FLITE), *KWIC Index to Comptroller General Decisions*. Denver, Colorado: FLITE, USAF, 1982. Set of twelve microfiche cards. Price: $25.00. Publisher's address: FLITE, Denver, Colorado 80279, tel. FTS or commercial (303) 370-4870 or Autovon 926-4870.

Computer technology has been steadily changing the practice of law more and more in recent years. A number of computerized legal research services are in existence, and several of these are available to attorneys employed by the United States Government. For example, the Department of Justice has a system called JURIS. To military and civilian attorneys in the Department of Defense, the FLITE system, operated by the Air Force at Lowry Air Force Base, near Denver, Colorado. FLITE has in its data base many federal judicial and administrative decisions, legislative documents, and other materials, all accessible by telephone to Department of Defense attorneys. Updating information is made available through a quarterly *FLITE Newsletter*.

FLITE has started publishing indexes for some of their computer files on microfiche. These cover such items as the Defense Acquisition Regu-

lation, the Military Rules of Evidence, and the Manual for Courts-Martial. These are called KWIC indexes, Key-word-in-context indexes.

One of the most recently produced FLITE microfiche indexes covers volumes I through 58 of the published decisions of the Comptroller General of the United States. These decisions, as printed, are published with bold-face words and phrases which are placed after the B-numbers but before the headnotes. These bold-face words and phrases, or scope notes, are indexed in the new KWIC index. Every work is listed in alphabetical order in every combination in which it appears, except for certain common words not useful for indexing. The index consists of twelve microfiche cards, and can be purchased from FLITE for $25.00.

5. Levy, Herbert Monte, *How to Handle an Appeal* (2d ed.). New York, N.Y.: Practising Law Institute, 1982. Pages: xxvii, 569. Price: $35.00. Four appendices, index. Publisher's address: Practising Law Institute, 810 Seventh Ave., New York, N.Y. 10019.

In this work, a trial attorney of many years' experience explains at length how to conduct an appeal within the federal court system. The book is the second edition of a work by the same author first published by Practising Law Institute in 1968. Substantially every aspect of appellate practice is discussed.

The book is organized in thirteen chapters and four appendices. The first chapter, "Preservation of Points for Appeal," discusses activities during trial, before the appeal stage is reached. Succeeding chapters discuss various practical and technical problems with appeals, such as fees, consultations with other counsel, timeliness of appeals, finality of judgment, and the taking and dismissal of appeals. Chapter 5 considers perfection of appeals. The preparation of appellate briefs is extensively discussed. A short chapter on attorney-client relations is provided. Oral argument and post-decisional activities are the subjects of further chapters. Practical suggestions are provided concerning practice before the U.S. courts of appeal and the Supreme Court. Chapter 13 is a check list for appellate practice.

Almost half the book is devoted to four documentary appendices. Appendix A is a collection of commonly used appellate forms, including notices of appeal, certain standard petitions, and the like. The second appendix contains sample briefs for use before the U.S. courts of appeals and the Supreme Court. The Federal Rules of Appellate Procedure, 18 U.S.C. App., are set forth in Appendix C, and the Supreme Court rules appear in Appendix D.

The work offers a detailed table of contents and a subject-matter index. The text is organized in numbered sections and subsections. There is

some use of footnotes, which are placed at the bottoms of the pages to which they pertain.

The author, Herbert Monte Levy, is an attorney in general practice in New York City, and has had extensive experience in litigation, especially appeals. Born in 1923, he studied at Columbia College and Columbia University School of Law, and was admitted to the bar of New York in 1946. Mr. Levy has been very active in various bar associations, and has published a number of articles and lectured frequently concerning appellate practice. From 1949 to 1956, he worked as staff counsel for the American Civil Liberties Union.

6. Murphy, Bruce Allen, *The Brandeis/Frankfurter Connection*. New York, N.Y.: Oxford University Press, 1982. Pages: x, 473. Price: $18.95. Appendix, notes, selected bibliography, index. Publisher's address: Oxford University Press, 200 Madison Ave., New York, N.Y. 10016.

The book here noted has received considerable critical attention in a time when revelations of official misconduct of people in high positions have become an almost daily occurrence. The questionable conduct of the two Supreme Court justices who are the subjects of this book is very mild indeed, but it nevertheless raises questions as to what is proper conduct in a judge.

Justice Louis D. Brandeis became a member of the Supreme Court in 1916. At approximately the same time, Felix Frankfurter, his close friend, became a professor at Harvard Law School. Justice Brandeis retired from the Court in 1939, dying in 1941. His place on the Court was taken by Justice Frankfurter, who served until 1962, dying in 1965.

While on the bench, both men intervened repeatedly in political matters behind the scenes, lobbying for or against proposed legislation, exerting influence on behalf of or against political appointees, and countless other matters. Such political activity is not unusual for judges; but in this case Brandeis paid money to Frankfurter to advocate various causes which Brandeis favored but on which he could not write or speak in public as a judge.

The author does not state any clear conclusions about the propriety of the two men's actions. To some extent he is an apologist for them, pointing out that many other judges have involved themselves in politics and that often all the causes for which these two worked were for the public good. But Mr. Murphy notes also that they tried very hard to keep their activities and their relationship secret (successfully, until now), possibly in acknowledgment of the ethical problems involved.

The work is exhaustively documented with extensive textual footnotes and a bibliography. An appendix discusses the political activism of many other Supreme Court justices, past and present. The work is concluded by a subject-matter index.

The author, Bruce Allen Murphy, is an assistant professor of political science at Pennsylvania State University.

7. Murray, Douglas J., and Paul R. Viotti, *The Defense Policies of Nations, A Comparative Study*. Baltimore, Md.: The Johns Hopkins University Press, 1982. Pages: xvi, 525. Price: $35.00, hardcover; $12.95, paperback. Glossary, index. Publisher's address: The Johns Hopkins University Press, Baltimore, MD 21218.

This work is a collection of essays by many different authors describing the defense policies of the United States, the Soviet Union, and various other important or representative countries. The essays were solicited and edited under the sponsorship of the United States Air Force Academy. The resulting work is a textbook for use in undergraduate and graduate-level courses in international relations, and for reference by government officials and other interested persons.

The book is organized in six parts and twelve chapters. The first part and chapter provide an introduction to and overview of defense policy in general. Part two focuses on the United States and the Soviet Union, the third part, on major Western European states, the United Kingdom, France, and West Germany, and also Sweden and Romania. Part four, "The Middle East," discusses Israel in one essay, and all other Middle Eastern countries together in another essay. The fifth part, on East Asia, concerns Japan and mainland China. The sixth and last part states the editors' conclusions.

A table of contents and explanatory foreword are provided, together with biographical sketches of the editors and the many contributors. Many of the essays are extensively footnoted, and several bibliographical essays are provided. There is some use of statistical tables and diagrams. The work concludes with an extensive bibliography and a subject-matter index.

The two editors are both Air Force lieutenant colonels and have served as associate professors of political science at the Air Force Academy. Colonel Murray holds a Ph.D. from the University of Texas at Austin, and is currently assigned to the Pentagon. Colonel Viotti is with the U.S. European Command, Stuttgart, Germany, and earned his Ph.D. at the University of California at Berkeley. Both editors have published a number of articles and studies on defense and international relations.

8. Myers, Henry A., *Medieval Kingship*. Chicago, Ill.: Nelson-Hall, Inc., 1982. Pages: ix, 467. Prices: $25.95, hardcover; $13.95, paperback. Notes, bibliography, index. Publisher's address: Nelson-Hall, Inc., Publishers, 111 North Canal St., Chicago, IL 60606.

This work traces in detail the evolution of the concept of monarchy from the time of the Roman Empire early in the Christian era, to the end of the Middle Ages. This is a work of history, and not a law book. Described are the relationship between church and state, the struggles of various European dynasties, and various theories or models of kingship that were developed over the centuries.

The book is organized in eight chapters. An introductory chapter, "The Dual Origin of Medieval Kingship," explains the Roman and Germanic sources for medieval ideas concerning monarchy. Subsequent chapters detail the role of the church in government, the stabilization efforts of the Merovingian dynasty of France, and the work of Charlemagne and his successors. Later chapters discuss kingship under the feudal system, the beginnings of the modern nation state and constitutionalism, and the development of the absolutist monarchies of the Renaissance.

The work offers a detailed table of contents and an explanatory preface. Notes are collected together at the end of the text. An extensive bibliography and a subject-matter index are provided.

The author, Henry A. Myers, is a professor of political science at James Madison University, Harrisonburg, Virginia, and has published a number of works on European history. He was assisted in performing research for *Medieval Kingship* by Herwig Wolfram, a professor at the University of Vienna.

9. O'Brien, William V., *The Conduct of Just and Limited War*. New York City, N.Y.: Praeger Publishers, 1981. Pages: xii, 495. Price: $39.95. Notes, bibliography, index. Publisher's address: Praeger Publishers, 521 Fifth Ave., New York, N.Y. 10175.

Scholars of the Middle Ages, especially after St. Thomas Acquinas, had a clear notion of what is a just war and how the concept should be applied in practice. In modern times this concept has come to be widely perceived as obsolete and irrelevant to modern military and political concerns. Professor O'Brien argues that this is not so. Using a case-study approach, he demonstrates how the old concepts can be applied to limited conflicts that arise in today's nuclear environment.

The work is organized in three parts and fourteen chapters. After an introductory chapter, Professor O'Brien devotes the seven chapters of Part I to the old concept of just war. Part II, with four chapters, deals

with limited war, a modern concept. The third part sets forth his conclusions in two chapters.

In his chapters on just war, the author examines the traditional international law concepts of *jus ad bellum* and *jus in bello*, and their origins and historical development. Focusing on the United States, he considers this country's role in World War II, Korea, and Vietnam. Some special problems of nuclear conflict, revolution, and counterinsurgency are considered.

Concerning limited war, Professor O'Brien again focuses on the Korean and Vietnam wars, and adds a chapter on the Yom Kippur War of 1973 between Egypt and Israel. The closing chapters, in Part III, concern methods of limiting war, and the current "state of the question" of the conduct of just and limited war.

The book offers an explanatory preface and a table of contents. Very extensive textual footnotes are collected after the last chapter, and are followed by a lengthy bibliography and a subject-matter index.

The author, Professor William V. O'Brien, has been a member of the faculty of Georgetown University, Washington, D.C., where he previously received his education, since 1950. He was formerly chairman of the Department of Government there, and has published many books and articles on questions of international law, war, and morality.

10. Postlewaite, Philip F., and Michael P. Collins, *International Individual Taxation*. Colorado Springs, Colorado: Shepard's/McGraw-Hill, 1982. Pages: xxv, 507. Extensive statistical and documentary appendices, tables of cases and other authorities cited, index. Publisher's address: Shepard's/McGraw-Hill, P.O. Box 1235, Colorado Springs, CO 80901.

It is commonplace for businessmen to travel, work, and conduct business activities of all sorts in countries other than their own. Income taxation authorities in the United States and other countries have noted this trend and have made special provisions for the taxation of the personal earnings and business profits of these businessmen. The book here noted describes provisions of the United States Internal Revenue Code and Regulations pertaining to such taxation. Specifically, the work covers taxation of foreign-source income of United States individuals and partnerships, and of United States-source income of foreign individuals and partnerships. Excluded are corporations and foreign taxation.

The book is organized in four parts and ten chapters. Part one describes the general scheme of United States taxation of nonresident aliens. Nonresidency is discussed, together with source-of-income rules, and concepts of trade or business and effective connection. The second

part considers taxation of Americans abroad, expatriation as a means of avoiding United States taxes, taxation in United States possessions and territories such as Puerto Rico, and the foreign-tax credit. Part three discusses tax treaties of the United States concerning business income and passive (i.e., interest, dividends, royalties) income. The fourth and last part deals with taxation of partnerships.

The book offers an explanatory introduction, a detailed table of contents, tables of cases and other authorities cited, and a subject-matter index. The text is organized in numbered sections and subsections, and is extensively footnoted. Notes appear at the bottoms of the pages to which they pertain. Elaborate appendices set forth documents of various sorts, including Congressional reports, statistical tables, and materials concerning international tax conventions.

Philip F. Postlewaite is an associate professor of law at North Western University School of Law, Chicago, Illinois, and Michael P. Collins is an associate with the New York City law firm of Coudert Brothers. Their book is part of the publisher's Tax and Estate Planning Series.

11. Roberts, Adam, and Richard Guelff, editors, *Documents on the Laws of War*. Oxford, U.K.: The Clarendon Press; Oxford University Press, New York, 1982. Pages: xiii, 498. Price: $34.50, hardcover; $17.95, paperback. Bibliography, index. Publisher's address: Oxford University Press, 200 Madison Ave., New York, N.Y. 10016.

The potential and even actual practical importance of the law of war can hardly be overemphasized in a year which has seen wars in Lebanon, and the Falkland Islands, together with continued warfare between Iraq and Iran, and between various other countries, peoples, factions, and the like. The work here noted, a collection of twenty-nine treaties concerning the law of war, from 1856 to 1981, will doubtless be highly useful to scholars and lawyers who do research and writing in this area.

The book opens with an introduction by the editors. They explain the meaning of the term "laws of war," the sources of that law, and its application to individuals and states. Non-international conflicts are mentioned, and the difficult question of the practical impact of the laws of war is addressed. The principles of selection of the documents reprinted in the volume are explained, and the system of notes is discussed.

The twenty-nine documents reproduced include the several Hague declarations and conventions from 1899 and 1907, the Geneva conventions of 1949, and the two Geneva protocols of 1977. The earliest item is the 1856 Paris Declaration Respecting Maritime Law, followed by the St. Petersburg Declaration of 1868. The most recent document is the United Nations convention of 1981 limiting the use of certain conventional

weapons, preceded by a 1978 Red Cross statement of seven rules of humanitarian conduct which should be applied in all types of armed conflicts.

A table of contents, table of abbreviations, bibliography, and index are provided. Extensive historical notes and tables are provided.

The two editors were members of the faculty of the London School of Economics and Political Science when they compiled this work.

12. Snyder, Louis L., editor, *Hitler's Third Reich: A Documentary History*. Chicago, Ill.: Nelson-Hall, Inc., 1981. Pages: xviii, 619. Price: $33.95, hardcover; $16.95, paperback. Documents; index. Publisher's address: Nelson-Hall, Inc., Publishers, 111 North Canal St., Chicago, IL 60606.

This work is a collection of 143 documents pertaining to the Nazi regime, linked together by explanatory editorial comments. The documents consist of speeches, news reports, government memoranda, statutes, regulations, military orders, and other similar materials, from both German and non-German sources. The documents span the period from the close of World War I to the end of World War II and the Nuremberg trials.

The book is organized in six parts. The first part provides background information concerning the Treaty of Versailles, the Weimar Republic, and the earliest beginnings of the National Socialist Party and Hitler's political career. Part Two covers the years from the Munich Beer-Hall *Putsch* in 1923, through Hitler's rise to power and appointment as German chancellor in 1933. The third part sets forth documents on the development and implementation of Nazi domestic policies, especially race policies, from 1933 to 1937. Preparations for World War II during 1937-1939 are documented in Part Four, and the war years themselves, 1939-1944, are covered in the fifth part. The sixth and final part, 1945-1946, covers the German defeat, the death of Hitler, the opening of the concentration camps, the allied occupation, and the Nuremberg trials.

The author, Louis L. Snyder, is a professor emeritus of the City University of New York, and has served as a visiting professor at the University of Cologne. He has authored a number of works on German history and World War II.

13. Stockholm International Peace Research Institute and Bhupendra Jasani editor, *Outer Space—A New Dimension of the Arms Race*. London, U.K.: Taylor & Francis, Ltd., 1982. Pages: xviii, 425. Price: U.S. $35.00 or UK pounds 18.50. Address of U.S. distributor: Oelgeschlager, Gunn & Hain, Inc., 1278 Massachusetts Avenue, Harvard Square, Cam-

bridge, MA 02138. Publisher's address: Stockholm International Peace Research Institute, Bergshamra, S-171 73 Solna, Sweden.

In the 25 years since *Sputnik*, the major powers have devoted large resources to the development of space technology. Satellite technology has enhanced the war-fighting capabilities of the great powers. The book noted examines the increasing military use of space and how it contributes to the ever-increasing nuclear threat.

In November 1981, the Stockholm International Peace Research Institute (SIPRI) organized a symposium on Outer Space at which 20 scientists, lawyers and diplomats from 12 different countries discussed the consequences of the militarization of outer space as well as further arms control and disarmament measures. This book contains the papers presented at the symposium.

The book is organized in two parts. Part I, consisting of seven chapters, is an introductory section written by the editor based on discussions at the symposium and other materials. Part I provides the reader with technological background to the arms race and space and discusses its implications for international security. Part II presents 15 papers presented at the symposium on the topics of space technology, crisis monitoring and arms control.

Reader aids include a table of contents, a preface, abstracts of the papers included, a glossary of technical terms used, a list of abbreviations, and a subject-matter index. The publication contains numerous tables and charts throughout the work and in appendices. Included for reference are six treaties that contain provisions aimed at some form of arms control in space.

The editor, Dr. Bhupendra Jasani, a nuclear physicist, is a research fellow at the Stockholm International Peace Research Institute (SIPRI) which he joined in 1972. He convened the SIPRI Symposium on Outer Space and organized the 1973 SIPRI Symposium on Nuclear Proliferation Problems.

The Stockholm International Peace Research Institute (SIPRI) describes itself as "an independent institute for research into problems of peace and conflict, especially those of disarmament and arms regulation." It is financed by the Swedish Parliament and was established in 1966. The staff and governing organs of the institute are international in membership.

14. Von Ward, Paul, *Dismantling the Pyramid: Government by the People*. Washington, D.C.: Delphi Press, 1981. Pages: vii, 231. Price: $11.95, hardcover; $7.95, paperback. Bibliography. Publisher's

address: Delphi Press, 475 L'Enfant Plaza, Suite 2970, Washington, D.C. 20024.

This work is a critique of the federal bureaucracy. The author, a former federal employee, presents his ideas concerning proper management and organization. He argues that bureaucracy in general and the federal bureaucracy in particular have developed in ways that stifle initiative and creativity, and which prevent in some cases the attainment of the goals and purposes for which the organizations involved were established. He urges individual citizens to organize themselves into groups, analogous with the "committees of correspondence" of the colonial era before the American Revolution, to work for improvements in government.

The book is organized in three parts and eight chapters. After an introductory chapter, the first part describes at length the problems of modern bureaucracy, its complexity, costliness, and inefficiency. The second part reviews past unsuccessful attempts to reform the federal bureaucracy, and sets forth the author's "theory for analysis and action." Essential to any reform effort, he argues, is re-education of the public, the bureaucrats, and the reformers to peel away away layers of time-honored but mistaken assumptions and beliefs concerning bureaucracy, government, management, and their purposes and capabilities. The third and final part sets forth the author's ideas for "reintegrating government and society," through greater public involvment in governmental processes.

The book offers a table of contents, explanatory preface, and bibliography. There is some use of footnotes. Chapter sections and subsections are set off with headings and subheadings.

The author, Paul Von Ward, is or has been a professional management consultant, and was formerly employed by the State Department and other federal agencies. He was educated at Florida State University and Harvard University, and served as a naval officer.

15. Young, Warren L., *Minorities and the Military, A Cross-National Study in World Perspective*. Westport, Connecticut: Greenwood Press, 1982. Pages: xii, 357. Price: $29.95. Appendix, bibliography, index. Publisher's address: Greenwood Press, 88 Post Road West, P.O. Box 5007, Westport, CT 06881.

The United States has made substantial strides toward providing equality of opportunity to minority group members and women during the past generation. The military services have made a most important contribution toward this goal. However, much still remains to be done, and the insights of scholars are always worth examining to discover

what is needed and how to fill the need. In this regard, the experience of peoples and societies may often prove illuminating.

In the work here noted, the author discusses the experiences of minorities in the military services of three foreign countries in addition to the United States. Belgium, with its French and Flemish populations, is considered, along with Canada, which has a French-descended minority in an English-descended majority, and Britain, which has had many immigrants from the former British colonies in the West Indies, Africa, and elsewhere. The United States also receives the author's attention, but only one minority, blacks, is discussed.

The book is organized in six chapters, providing an introduction and conclusions, with chapters on each of the four countries discussed. An appendix provides a bibliographic essay and review of the literature on minorities.

For the convenience of readers, the book offers a table of contents, list of statistical tables used, explanatory introduction, bibliography, and subject-matter index. The work is Number 6 in the Greenwood Press series, "Contributions in Ethnic Studies."

The author, Warren L. Young, is a lecturer in sociology at the Center for Technological Education, Holon, Israel, and with the European Division of the University of Maryland. He has published a number of monographs and articles.

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